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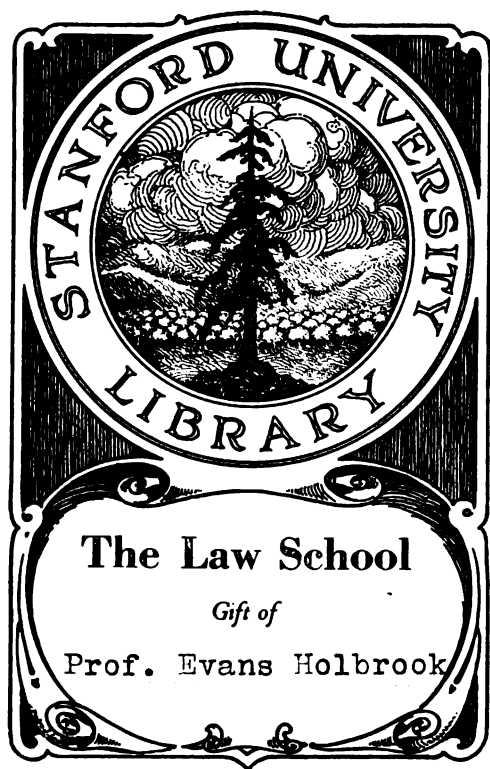
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*27 East. Court for the Consideration
of the Cases*

CROWN CASES

RESERVED FOR CONSIDERATION,

AND

DECIDED BY THE JUDGES OF ENGLAND,

FROM THE YEAR 1850 TO THE YEAR 1851.

BY STEPHEN CHARLES DENISON,
OF THE INNER TEMPLE, ESQ., BARRISTER AT LAW.

CONTINUED FROM TRINITY TERM, 1851, TO TRINITY TERM, 1852,
BY ROBERT ROUIERE PEARCE,
OF GRAY'S INN, ESQ., BARRISTER-AT-LAW.

With Notes,
REFERRING TO AMERICAN DECISIONS,
BY GEORGE SHARSWOOD.

VOL. II.

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P R E F A C E .

THE Cases in the present Volume up to Trinity Term, A. D. 1851, including *Hogan's case*, p. 280, are reported by Mr. DENISON.

For the remainder of the Volume, I am responsible; and my endeavour has been to emulate the fidelity and accuracy of my learned predecessor, which have gained for this series of Reports the approbation of the Bench and of the Profession at large.

At the suggestion of several friends of great experience, I have reported, together with all the Crown Cases Reserved under 11 & 12 Vict. c. 78, decided up to this date, Crown Cases, *ejusdem generis*, argued and determined in the Queen's Bench and the Courts of Error; in this particular, following the plan of the elder Reporters of Crown Law, and supplying a deficiency frequently felt by those engaged in the practice of the Criminal Law.

I have to express my most grateful acknowledgments to several of the learned Judges, who have kindly favoured me with cases, MS. notes, and the written judgments of their Lordships, which favours are more particularly acknowledged in the course of the Volume.

ROBERT ROUIERE PEARCE.

TEMPLE,
June 26, 1852.

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REPORTS
OF
CROWN CASES RESERVED,

&c., &c., &c.

THE QUEEN *v.* MOOREHOUSE JAMES.

A clergyman was indicted for refusing to solemnise a marriage between *Henry F.* and *Ann H.*, who had obtained a certificate under stat. 6 & 7 *Wm.* 4, c. 85. It was proved that *Henry F.* applied to the clergyman after 9 p. m. on 2nd *August*, and desired him to "fix a time for the marriage on or before the 14th *August*," after which day the certificate would be void. *Ann H.* was not with him. The clergyman said, "I will marry him when he has expressed a desire to be confirmed." *Henry F.* thereupon went away and made no further application.

Held, that this did not support a conviction on an indictment which averred that the clergyman "unlawfully, &c., did refuse, &c. to solemnise a marriage, &c., at any time on or before the said 14th day of *August*, or at any other time whatsoever;" inasmuch as the refusal laid was absolute, and that proved conditional.

Semble, per *ALDERSON*, B., that it should have been averred that the parties might lawfully be married to each other.

THE defendant was tried before Mr. Baron *ALDERSON*, at the Spring assizes for *Liverpool*, on the following indictment:—

Lancashire (to wit). The jurors for our Lady the Queen upon their oath present, that heretofore and after the 1st day of *March*, in the year of our Lord, 1837, to wit, on the 14th day of *May*, in the year of our Lord, 1849, to wit, at the parish of *Leigh*, in the county of *Lancaster*, one *Henry Fisher*, bachelor, being *desirous of contracting a marriage with one *Ann Hardman*, [*2

spinster, duly gave a notice under the hand of him the said *Henry Fisher*, and bearing date the day and year last aforesaid to one *John Heyes*, then and still being the Superintendent Registrar of Marriages, of and for the district of *Leigh Union*, in the said county of *Lancaster*, pursuant to the provisions of an act of Parliament, made and passed in the session of Parliament, holden in the 6th and 7th years of the reign of his late Majesty King *William* the Fourth, intituled "An Act for Marriages in England," and in the form of Schedule (A.) to the said act annexed, that a marriage was intended to be had within three calendar months, from the date thereof between him the said *Henry Fisher*, and the other party in the said notice named and described, that is to say, the said *Ann Hardman*, spinster, at a certain church, within the said district of *Leigh Union*, being the district of the said *John Heyes*, as such Superintendent Registrar as aforesaid, that is to say, a certain church called *Saint Thomas's Church, Bedford*, they the said *Henry Fisher* and *Ann Hardman* having before then dwelt at Bedford, within the said district during more than one calendar month then next preceding; and the jurors aforesaid, upon their oath aforesaid, do further present, that the said *John Heyes* so being such Superintendent Registrar as aforesaid, immediately upon the giving to him of the said notice as aforesaid, to wit, on the day and year last aforesaid, at the parish aforesaid in the county aforesaid did duly file the said notice, and keep the same with the records of his office, and did also forthwith enter a true copy of the said notice fairly into the book for that purpose furnished to him by the Registrar General, called the Marriage Notice Book, and kept by him the said *John Heyes*, as such Superintendent Registrar *as aforesaid, for the purpose aforesaid, in pursuance of and in obedience to the provisions of the said act of Parliament in that behalf; and the jurors aforesaid, upon their oath aforesaid

do further present, that afterwards and after the expiration of twenty-one days after the entry of the said notice in the said book as aforesaid, to wit, on the 12th day of *June*, in the year aforesaid, to wit, at the parish aforesaid, in the county aforesaid, he the said *John Heyes* then being and continuing such Superintendent Registrar as aforesaid, did upon being thereunto requested by the said *Henry Fisher*, the party by whom the said notice had been and was so given as aforesaid, issue under his hands a certificate pursuant to the provisions of the said act of Parliament, and in the form of Schedule (B.) to the said act annexed, no lawful impediment being shewn to the satisfaction of him the said *John Heyes*, why such certificate should not issue, and the issue of such certificate not having been sooner forbidden in manner in the said act mentioned by any person or persons authorized in that behalf, as in the said act is provided, in and by which said certificate, he the said *John Heyes* as Superintendent Registrar of the said district of *Leigh Union*, in the said county of *Lancaster*, did certify in manner and form by the said act of Parliament directed and required that on the 14th day of *May*, 1849, notice was duly entered in the Marriage Notice Book of the said district of the marriage intended between the parties therein named and described, delivered under the hands of the said *Henry Fisher*, one of the said parties, that is to say, the said *Henry Fisher*, bachelor, and *Ann Hardman*, spinster, at the church called *Saint Thomas's Church, Bedford*; and the jurors aforesaid, upon their oath aforesaid, do further present that *at the respective times of the entry of the said notice, and of the issuing of the said certificate by the said *John Heyes* as such Superintendent Registrar as aforesaid, and from the said respective times continually until and at the time of the committing of the offence hereinafter mentioned, *Moorehouse James*, late of

the said parish of *Leigh*, in the said county of *Lancaster*, clerk, was, and still is, the officiating minister of and at the said church called *Saint Thomas's Church Bedford*; and the jurors aforesaid, upon their oath aforesaid do further present, that afterwards and after the issuing of the said certificate by the said *John Heyes* as Superintendent Registrar as aforesaid, and while the said certificate was in full force and effect, to wit, on the 2nd day of *August* in the year aforesaid, to wit, at the parish aforesaid in the county aforesaid, they, the said *Henry Fisher* and *Ann Hardman* did produce and shew the said certificate to the said *Moorhouse James* so being such officiating minister of the said church as aforesaid, and did then and there require him the said *Moorhouse James* as such officiating minister of and at the said church to solemnise a marriage between them the said *Henry Fisher* and *Ann Hardman* at the said church on or before the 14th day of *August* then instant (the said 14th day of *August* being the day on which the said notice and certificate and all proceedings thereupon would, under and by virtue of the said act of Parliament become and be utterly void if the said marriage were not had and solemnised on or before the said last-mentioned day); and the jurors aforesaid upon their oath aforesaid, do further present that the said *Moorhouse James* so being such officiating minister of and at the said church as aforesaid, not regarding his duty in that behalf nor the statute *in such case made and
*5] provided, heretofore, to wit, on the said second day of *August* in the year aforesaid, to wit, at the parish aforesaid, in the county aforesaid, unlawfully and wrongfully did refuse and neglect, although he the said *Moorhouse James* was so thereunto required as aforesaid, to solemnize a marriage between the said *Henry Fisher* and *Ann Hardman* at the said church at any time on or before the said 14th day of *August* in the

year aforesaid, or at any other time whatsoever, and to solemnise a marriage between the said *Henry Fisher* and *Ann Hardman* at the said church, he the said *Moorhouse James* hath always continually from the time when the said certificate was so produced and shewn to him the said *Moorhouse James* as aforesaid, and he the said *Moorhouse James* was so thereunto required as aforesaid to the time of the taking of this inquisition, unlawfully and wrongfully refused and neglected, and still doth unlawfully and wrongfully neglect and refuse contrary to the duty of him the said *Moorhouse James* in that behalf against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity."

In order to sustain this indictment, the Superintendent Registrar for *Leigh*, and who was also clerk to the Board of Guardians for that union, proved that on the 14th of May, 1849, the following notice of marriage was delivered to him by *Henry Fisher*.

COPY.

Notice of Marriage.

(Pursuant to 6 & 7 Wm. 4, c. 85, s. 4.)

To the Superintendent Registrar of the District of *Leigh Union*, in the County of *Lancaster*.

Name.] I hereby give you notice that a marriage is intended to be had within three calendar months from the date hereof, between me and the other party herein named and described (that is to say),

Name.	Condition.	Rank or Profession.	Age.	Dwelling Place.	Length of Residence.	Church or Building in which marriage is to be solemnized.	District and County in which the other party dwells where the parties dwell in different districts.
<i>Henry Fisher.</i>	Bachelor.	Stripper and Grinder.	20	<i>Bedford.</i>	More than a month.	<i>St. Thomas's Church, Bedford.</i>	
<i>Ann Hardman.</i>	Spinster.	Frame Tenter.	20	<i>Bedford.</i>	More than a month.		

Witness my hand this 14th day of *May*, 1849.

HENRY FISHER.

This notice was duly read on three consecutive weekly meetings at the Board of Guardians for the union in which *Leigh* was situated, and duly entered in the Registrar's

books. At the end of that period *the following certificate of marriage was granted by the Superintendent Registrar.]*

COPY.

Superintendent Registrar's Certificate for Marriage without License.

I, *John Hayes*, Superintendent Registrar of the District of the *Leigh Union*, in the County of *Lancaster*, do hereby certify, that on the 14th day of *May*, 1849, notice was duly entered in the Marriage Notice Book of the said District of the marriage intended between the parties therein named and described, delivered under the hand of *Henry Fisher*, one of the parties (that is to say),

Name.	Condition.	Rank or Profession.	Age.	Dwelling Place.	Length of Residence.	Church or building in which marriage is to be solemnized.	District and County in which the other party dwells where the parties dwell in different districts.
<i>Henry Fisher.</i>	Bachelor.	Stripper and Grinder.	20	<i>Bedford.</i>	More than a month.	<i>St. Thomas's Church, Bedford.</i>	
<i>Ann Hardman.</i>	Spinster.	Frame Tenter.	20	<i>Bedford.</i>	More than a month.		

Date of Notice entered, *May 14th*, 1849. } The issue of this certificate has not been forbidden by any
Date of Certificate given, *June 12th*, 1849. } person authorized to forbid the issue thereof.

Witness my hand this twelfth day of *June*, } JOHN HAYES, } Superintendent
One thousand eight hundred and forty-nine. } Registrar.

This Certificate will be void unless the marriage is solemnized on or before the 14th day of *August*, 1849.

*8] *With this certificate, *Henry Fisher*, who, as well as *Ann Hardman*, had, for a month and upwards, before the first notice, resided within the district, called on the defendant, who was the officiating minister of *Saint Thomas's Church*, a district church in the parish of *Leigh*, on the 13th of *June*, 1849. *Fisher's* evidence was as follows:—"I told him I was come to give notice I intended to be married next morning at *Saint Thomas's*. He asked me if I had been baptized—I said yes. He asked me what was my name—I told him. He asked me if I had been asked in church—I said no. He asked where I had been asked—I said at the Board of Guardians. He asked me if I had been confirmed—I said no. He said he could have nothing to do with me then—I said, why? He said he was not obliged to tell me his reason—I said, very well, I'll go to the Board of Guardians and see what they say. He said if people would be so foolish as go to a Board of Guardians to be asked, the Board of Guardians must marry them."

The Superintendent Registrar also gave the following evidence:—"On the 19th *June*, I called on defendant. He is officiating minister of *Saint Thomas's Church, Bedford*, in *Leigh* district. I saw him in company with *Fisher*. I told him my name and office. I said I had corresponded with the Registrar about it in consequence of his refusal to marry the parties. I said the Registrar General did not consider confirmation a pre-requisite or any legal impediment to the marriage. Defendant said he had seen *Fisher* before, and declined to say any thing. I said then *Fisher* has something to say. *Fisher* put his hand into his pocket, and was about to address defendant, who refused to hear him. The defendant retired and closed the door of his residence. I went again on 2nd *August* with *Fisher, Hardman*, and a solicitor, *Whitehead*; *9] *we saw defendant. *Whitehead* said, we were come about a marriage, wishful that arrangements

could be made by which parties could be married on a certificate. *Fisher* produced it. Defendant said he supposed it was all right according to law. *Fisher* desired him to fix a time for marriage on or before the 14th of *August*. *Hardman* made a similar demand. Defendant—I'll marry him when he, *Fisher*, has expressed a desire to be confirmed—the party made no reply. They then repeated the demand. Defendant said, I have given you my answer. It was after 9 P. M. when we called." No other evidence was given to all the facts thus proved.(a)

It appears that *St. Thomas's Church* was consecrated in 1840, but the act of consecration was not produced in evidence.

There was a font in the church, and a burying ground in which interments had taken place, attached to it; but there was no proof of marriages having been, or having been seen, to be celebrated there.

Bliss, for the defendant, took various objections. 1st, That if there was a refusal to marry, and without sufficient reason, it was not an indictable offence, but an offence against ecclesiastical law only. 2nd, That the refusal on the ground that *Fisher*, one of the parties, had not been confirmed, which was the fact, was justifiable. 3rd, That there were other reasons apparent on the facts proved justifying such refusal. And that the defendant, even though he had refused on one ground only, had full right to avail himself of those objections also. 4th, That there was not a sufficient demand and tender of themselves to be married by the parties—no readiness to be married sufficiently proved, nor any consent of parents signified to the *defendant, both parties being, as [*10] was the fact, minors. 5th, That a refusal on the 2nd *August* was not sufficient, the certificate enabling

(a) *Sic* in copy of case reserved.

the parties to be married up to the 14th *August*. 6th, That there was no proof of *Saint Thomas's* being a church where marriages were celebrated.

He made also various other objections to the indictment and to the proof given.

As there was no dispute about the facts, the learned Baron directed a verdict for the Crown, in order that the points of law might be raised; and he respite^d the judgment till the next assizes.

On 1st *June*, 1850, this case was argued before WILDE, C. J., PATTESON, J., ALDERSON, B., COLERIDGE, J., and PLATT, B.

Bliss and *Badeley*, for the defendant. The *Attorney General* and *Crompton*, for the Crown.

Bliss contended, *first*, that the defendant was justified in refusing, because lawful impediments existed, and the defendant rested his refusal on one of such lawful impediments. He relied for this part of the case on the nature of the rite of marriage, the formularies of the Liturgy, the Rubrics, the Canons, and the opinions of eminent divines, and stat. 7 *Wm.* 4, and 1 *Vict.* c. 22, s. 36. *Secondly*, that if the defendant acted *bonâ fide*, he would not be criminally liable, even though he had refused under a mistaken notion as to the legality of the impediment. *Thirdly*, that the offence, if any, was cognizable only in an ecclesiastical Court. (a) *Fourthly*, that the evidence did not support the averment in the indictment, that the defendant refused to solemnize the marriage at any time, on or before the 14th of *August*. It was *11] proved, that after 9 P. M., on the 2nd *August*, the parties applied to the defendant "to fix a time for marriage on or before the 14th *August*. The defendant said,

(a) As the judgment is not founded on any matter of ecclesiastical right or duty, the arguments on this part of the case are omitted. For a full report of hem, see 1 *Temple and Mew*, Rep. 300.

that he would marry them, when *Fisher* expressed a desire to be confirmed. This was not an absolute refusal, but a conditional one; it was in the power of the parties to turn it into a consent to marry them. But they never tendered themselves again.

ALDERSON B. They may have had a right to be married if they offered themselves at canonical times. The defendant was not bound to make arrangements for them, which is, in fact, all they asked.

Bliss also took the following objections in arrest of judgment. *First*, there was no averment that the parties might lawfully marry; there is no legal presumption in favour of such right.

ALDERSON B. For all that appears they may be uterine brother and sister, by different fathers.

Bliss. *Secondly*, it is not averred that they were ready to marry on the 14th of *August*, but only on the 2nd, when they could not be married owing to the lateness of the hour; it is not said that they continued ready. *Thirdly*, the church is not averred to be within the Registrar's district. *Ex parte Brady*, 8 Dowl. 332. *Fourthly*, nor that the church was one in which marriages might be solemnized; *Fifthly*, nor that the defendant was in holy orders of the church of *England*. He is styled clerk and officiating minister at the said church, but that is only an addition at the time of the indictment being found.

Crompton, for the Crown, (a) was directed by the Court to address himself to the question whether the parties had made a sufficient tender of themselves to the defendant to warrant a conviction.

*ALDERSON B. How do you get over the difficulty that a tender ought to be made at the time [*12 when the ceremony could be performed? on the 2nd of August the woman was not present.

(a) The Attorney General had left the Court.

The *Attorney General* came into the Court and said that the prosecution had been instituted with the sole view of obtaining the opinion of the Court upon a point of great importance, namely, the power of the clergyman to refuse to marry persons under circumstances like the present. It was a matter on which great difference of opinion existed, and it was extremely desirable that the law should be settled and known: but if the Court thought that they should decide the case upon another ground, he should not, on the part of the Crown, offer any argument on technical points.

WILDE C. J., said that the Court were of opinion that the tender was insufficient, and therefore the evidence did not sustain the averment of a refusal; and—

ALDERSON B., said that the want of an averment that the parties might lawfully marry seemed to him to be a very formidable objection. (a)

(a) The following is an extract from a report of the trial published as a pamphlet by *Batty*, 159, *Fleet Street*.

"*Bliss* contended, that the fact of the parties living in notorious concubinage was good ground for the clergyman's refusal.

"ALDERSON, B. I cannot take notice of that objection now, it was not stated to *Fisher* at the time he demanded to be married. The defendant took no objection of that kind: if he had, I should have had great difficulty in saying it was not a good and sufficient objection.

"*Bliss*. Does not your Lordship think, that though not urged at the time, it may be brought forward now?

"ALDERSON, B. No. If that objection had been taken at the time, the parties might have removed it by adopting a different course of life, and living with propriety and decency.

"*Knowles*. There were two months in which they might have done so.

"ALDERSON, B. This was not the objection on which the defendant said he declined to marry the parties. Their living in a state of concubinage, I would not willingly say would not be a good objection, and I would not willingly deprive you of it if it had been made. Then it would have been a question on which the young people would have had an opportunity of saying 'We will shew our desire to lead a holy life; we will refrain from living in a state of concubinage, and we will shew you, by our conduct, that we are anxious to refrain from sin.' But if you do not state the objection, the party cannot remove it, and I shall hold you therefore to the objection you have taken.

"*Bliss*. Perhaps, your Lordship will reserve that point?"

**Note by Editor.*—The indictment charged an absolute and unlawful refusal. [*13 The plea "not guilty" throws on the Crown the burden of proving three things; 1st, a refusal in fact; 2d, an absolute refusal; 3d, an unlawful refusal. The evidence only proved a conditional refusal, upon which the defendant would be entitled to an acquittal, whether such refusal were lawful or unlawful. But supposing the indictment had been so framed as to require evidence of a conditional refusal, it is difficult to see how the defendant, on proof of such conditional refusal, *if unlawful*, could in *rerum naturâ* rebut such evidence by showing that grounds existed on which a lawful refusal might have been maintained. For it would be in effect to say, "True, I did refuse on unlawful, and therefore untenable grounds; but had I known better or been more prudent, I might have refused on lawful and tenable grounds." This would be to repel a charge of doing an act in an unlawful manner by proving that it might have been done in a different and lawful manner. It seems that on the general principles of the doctrine of notice in civil cases the party applying would be entitled to treat an express particular ground of refusal as the only ground on which any refusal could be maintained. *R. v. Inhabitants of Staple Fitzpaine*, 2 Q. B. 498, and cases there cited in note (a), p. 499. The same principle seems to apply to criminal cases.

Quære, how would the case have stood on this indictment, if the defendant had simply refused to marry the party without assigning any reason? It seems that he would have been entitled to prove any number of lawful grounds of refusal. For "not guilty" means, "I did not refuse, or if I did, I refused lawfully."

***THE QUEEN v. WALTER WATTS.**

[*14

A. was convicted on the 14th count of an indictment which charged him with "stealing a piece of paper, the property of *Goldsmid* and others, his masters." *Goldsmid* and others were directors of the *Globe Insurance Company*, managed the affairs of the company, appointed, paid, controlled, and dismissed the clerks and other servants, and had the charge and custody of all the books and papers of the company.

The company had a drawing account with *Glyn & Co.*, and used to send their pass-books on *Tuesday* in every week to be written up, and their messenger went on the following morning to bring it back, when it was returned together with the cheques, &c. of the preceding week. A. was a salaried clerk in the office of the company, and also a shareholder; it was his duty to receive the pass-book and vouchers from the messenger, and to preserve the vouchers for the use of the company. On 27th *February*, *Glyn & Co.* delivered the *Globe* pass-book, containing among other things a certain cashed cheque for 1400*l.* to the messenger of the company, who delivered the book and cheque to A. in the usual way, and he thereupon fraudulently destroyed it.

Held, (1), that the cheque was the property of the directors, and that A., though a shareholder in the company, had no joint property in it. (2). That he was

guilty of larceny as a servant, inasmuch as the cheque when delivered into the custody of *A.* in the usual course of business, was constructively in the possession of the directors, who, under the circumstances, were his masters.

THE prisoner was tried before Mr. Justice CRESSWELL, at the Central Criminal Court, on the 10th of May, 1850, on an indictment, of which the following is an abstract.

"*Walter Watts.* That he on the 26th *February*, at *St. Mary's Woolnoth*, in *London*, was clerk to *George Carr Glyn*, and whilst he was such clerk, feloniously did steal one order for the payment of money, to wit, for the payment and of the value of 1400*l.* belonging to the said *George Carr Glyn*, his master.

"2d count, alleges that said prisoner was clerk to the said *George Carr Glyn*, as and then and there being treasurer of the *Globe Insurance Company*, and that he did steal one order, &c., belonging to the said *George Carr Glyn* as such treasurer.

"3d count, alleges that said prisoner was servant to *Edward Goldsmid* and others, and that he did steal one order, and belonging to them his masters.

*15] "4th count, like third, only instead of alleging the order to belong to *Goldsmid* and others, alleges it to have been in their possession and power.

"5th and 6th counts, *William Tite* and others, instead of *Goldsmid* and others.

"7th and 8th counts, embezzling the order, the property of *Glyn*.

"9th count, embezzling the order, the property of *Goldsmid* and others.

"10th count, embezzling 1400*l.* of *Goldsmid* and others, his masters.

"11th count, embezzling the order, the property of *Tite* and others.

"12th and 13th counts, stealing a piece of paper belonging to *Glyn*, his master.

"14th count, *stealing a piece of paper, the property of Goldsmid and others, his masters.*

"15th count, *stealing a piece of paper in the possession and power of Goldsmid and others, his masters.*(a)

"16th count, *stealing a piece of paper, the property of Tite and others, his masters.*

"17th count, *stealing a piece of paper, in the possession and power of Tite and others, his masters.*

"18th, 19th, 20th, and 21st. Like 7th, 8th, 9th and 11th, only embezzling a piece of paper instead of embezzling the order.

"22d, 23d, 24th, and 25th, *stealing an order for the payment of money, the property of said persons, without alleging the prisoner to be servant.*

"26th, 27th, 28th, and 29th, *stealing a piece of paper, the property of said persons, without alleging the prisoner to be servant."*

It appeared that he had for many years been employed *as a salaried clerk in the office of the *Globe Insurance Company*, and that he was also a shareholder [*16 in the concern. The affairs of the company, which is an unincorporated co-partnership, are managed by a body of directors, chosen out of the shareholders; and at the time when the alleged offence was committed, *Edward Goldsmid* was chairman, and *William Tite* deputy chairman of the directors, and *George Carr Glyn* was treasurer. The directors appoint and dismiss clerks and other servants, and fix their salaries and the particular duties to be discharged by them; and the directors have the charge and custody of all books and papers belonging to the company. The salaries of the clerks are paid out of the funds of the company.

The company had a drawing account at the bank of *Glyn & Co.*, and were in the habit of sending their pass-

(a) See stat. 7 & 8 Geo. 4, c. 29, s. 46.

book on *Tuesday* in every week to be written up, and their messenger went on the following morning to bring it back, when it was returned, together with the cheques and bills paid during the preceding week.

The prisoner was the person whose duty it was to receive the pass-book and vouchers from the messenger, and it was his duty upon receiving them to compare the entries in the pass-book with the books of the company, and to preserve the vouchers for the use of the company if wanted on any future occasion. On the 26th of *February*, the prisoner paid into the *London and Westminster Bank* for his own account (which he kept there) a cheque for 1400*l.* purporting to be drawn by the *Globe Insurance Company* on *Glyn & Co.*, together with other cheques for the *London and Westminster Bank* entered to the debit of the *Globe Assurance Company* in their pass-book, and delivered, together with the book, on the following *Wednesday* *to the messenger of the company, who *17] delivered the book and cheque to the prisoner in the usual way. On the 4th of *March*, in consequence of some suspicion attaching to the prisoner, a search for the cheque for 1400*l.* was made during his absence amongst the vouchers in his keeping, and it could not be found. His papers were then sealed up, and he, on finding such a step was taken, said he would not remain there, and quitted the office.

The pass-book was examined, and there the entry of the cheque for 1400*l.* had been erased, and the cheque was never found.

There was no evidence to shew that any person on behalf of the company had ever drawn the cheque in question, or that it had been drawn upon paper stolen from the company.

Upon this state of facts, it was contended by the prisoner's counsel, that there was no evidence of any property

in any of the parties from whom the cheque was alleged to have been stolen, except as shareholders, and that the prisoner being also a shareholder could not be indicted for stealing the property of which he was a joint owner. That the statute 47 Geo. 3, c. xxx. sess. 1, *An Act to enable the Globe Insurance Company &c. (a)*, made the treasurer the representative* of all the shareholders, and, therefore, of the prisoner as well as others, and did not alter the case. [*18]

The learned Judge thought that the charge of embezzlement, and of stealing an order for the payment of money failed; but in order to obtain the opinion of this Court, with regard to the charge of stealing a piece of paper, he told the jury that if the cancelled cheque was returned to the prisoner, and he received it in the usual manner, to be kept by him for the use of the directors, and afterwards abstracted or destroyed it, they should find him guilty.

The jury found him *guilty* of stealing a piece of paper,

(a) Be it enacted, "That all actions and suits to be commenced or instituted by or on behalf of the said society or partnership against any person or persons, or body or bodies politic or corporate, shall or lawfully may be commenced or instituted, and prosecuted in the name or names of the treasurer or treasurers for the time being of the said society or partnership as the nominal plaintiff or plaintiffs for and on behalf of the said society or partnership, and that all prosecutions to be brought or instituted by or on behalf of the said society or partnership for fraud, upon or against or for embezzlement, robbery of, or stealing the property of the said society or partnership, or for any other offence committed against, or with intent to injure or defraud the said society or partnership, shall or lawfully may be so brought or instituted and carried on in the name or names of the treasurer or treasurers for the time being of the said society or partnership, and in all indictments and informations, it shall be lawful to state the property of the said society or partnership to be the property of the treasurer or treasurers for the time being of the said society or partnership, and any offence committed with intent to injure or defraud the said society or partnership, shall and lawfully may, in such prosecution, be laid to have been committed with intent to injure or defraud the said treasurer or treasurers for the time being of the said society or partnership, and any offender or offenders may thereupon be lawfully convicted of any such offence, and the death, resignation, or removal, or other act, of such treasurer or treasurers shall not abate any such action, suit, or prosecution."

and a case was reserved for the opinion of this Court whether the direction was right or not.

This case was argued on 8th *June*, A. D. 1850, before WILDE C. J., PATTESON J., ALDERSON B., COLERIDGE J., and CRESSWELL J.

The *Attorney General*, Sir *John Bailey*, *Clarkson*, and *Bovill*, for the Crown. *Cockburn*, Q. C., *Bodkin* and *Bramwell*, for the prisoner.

Cockburn Q. C., for the prisoner.

*19] *1. There is no evidence to warrant the verdict of Guilty of stealing.

CRESSWELL J.—The only question is, whether my direction to the jury was right in point of law.

ALDERSON B.—You must deal with the case as though you were moving for a new trial on the ground of misdirection.

Cockburn Q. C. 2. If there is any offence proved it is embezzlement, not larceny. The cheque never came into the possession of the prisoner's masters. The facts are these. The *Globe Insurance Office* kept a banking account with *Glyn & Co.*, drew cheques upon them, and had a pass-book, which was returned weekly with the cheques by a messenger, who, on this occasion, received the book as usual with the cheque in question, and delivered it to the prisoner. Thus it is a delivery by one servant to another. *R. v. Masters*, 1 Den. C. C. 332. There the money had never got into the hands of the master; it was in the course of passage to him. Here the facts are exactly the same. If the messenger had appropriated the cheque, it would have been embezzlement, not larceny, because it was not in the possession of the master: neither was it when in the hands of the prisoner.

WILDE C. J.—I thought that the Court distinguished *R. v. Murray*, 1 Moo. C. C. 276, (a) from *R. v. Masters*,

(a) S. C., 5 C. & P. 145, in notis, and 2 Greaves's Russell, 180.

1 Den. C. C. 332, owing to the circumstances of the possession of the servant, in the former case, being considered to be the possession of the master.

COLERIDGE J.—In this case it is found to be the duty of the prisoner to preserve the vouchers for his masters. Suppose my servant goes to a silversmith *to get some plate for me; he gets it, and deposits it in [*20 the plate chest, and then appropriates it. Is not that a stealing?

CRESSWELL J.—Supposing my footman gives to my butler a new piece of plate, and the butler appropriates it. Is not that a stealing?

Cockburn Q. C. Suppose the butler met the footman in the street and took it, that is clearly embezzlement. Suppose the plate brought home, and the butler to take care of it, and put it in the plate chest, *quære*, whether it would be in the possession of the master? Here, if the prisoner's duty were merely to keep it in his own possession, and to produce it when called upon by his masters, that would not be possession by the masters. The possession of the masters must suppose a place of deposit belonging to them. If the prisoner might keep the cheque where he pleased, there would be no possession by the master prior to delivery. But assuming it to be the prisoner's duty to put it in a place of deposit, the case never finds that he put it in such place, but only that he destroyed it. Thus it is, at the utmost, only a case of embezzlement. The evidence only is, that the messenger put it into his hands, and no more is known of it. The case, therefore, falls short of that put by COLERIDGE J.

ALDERSON B.—You will contend that in *R. v. Murray*, 1 Moo. C. C. 276, it was held not to be embezzlement, but larceny, because the clerk was there deemed to have received the money in the first instance from the master,

owing to the possession of the managing clerk, from whom he received it, being in law the possession of the master whereas here, the cheque cannot be considered to have ever been in the possession of the master.

Cockburn Q. C. Suppose the messenger had given the
*21] *cheque to a stranger to deliver to the prisoner,
there would have been no larceny had he appropriated it.

ALDERSON B. Suppose Messrs. *Glyn* had given the messenger a letter addressed to the insurance company, and the messenger had given it to the prisoner, and he had then appropriated it, would it not have been larceny of the paper on which the letter was written? This raises the question neatly and simply, because it divests it of the element of "cheque." Whose property is the cheque when at *Glyn's*?

Cockburn Q. C. It is *Glyn's*. But that is often made a matter of convenience and arrangement. If it is considered to belong to the customer it is merely by the concession of the banker.

WILDE C. J. I apprehend that the banker has no more right to it than the payee of a bill of exchange has to the bill when paid. It is true that an acceptor may keep it, because it is his voucher, and he can charge no one with it.

Cockburn Q. C. Bankers are acceptors. The cheque is a voucher; it is the banker's only discharge.

WILDE C. J. It is always considered that the cheque is the property of the drawer when paid.

Cockburn Q. C. The practice of the *London* bankers is to return a cheque; but it is clearly the voucher of the banker. In either case it is the order to pay, and is the justification and discharge of the payer; but here though the drawer were entitled to receive it back, yet he does not do so here.

ALDERSON B. If it was the property of the master when in the banker's hands, then it was in the master's possession at the time.

Cockburn Q. C. The bankers have a special property in it certainly till the account is settled.

ALDERSON B. But if he has only a special property *in it, and a right to keep it *pro tempore*, then [*22 he only holds it as agent for the customer.

Cockburn Q. C. In any case the doctrine only applies to a genuine cheque, but the evidence fails as to that; there is no evidence of any thing but a piece of paper.

WILDE C. J. Could the *Globe Company* have maintained trespass against the messenger for destroying it?

Cockburn Q. C. No.

ALDERSON B. Suppose the prisoner to have forged the cheque, and then to have done with it all that this case supposes, would it have been larceny? That supposition meets all the facts of this case.

WILDE C. J. Could not the *Globe Company* have maintained trover against the messenger?

Cockburn Q. C. Yes; but so they could in case of embezzlement.

ALDERSON B. It certainly might have been laid in the prisoner as against a wrong-doer; (a) could it have been laid in the master?

Cockburn Q. C. I think not; but I rely on the broad distinction between larceny and embezzlement. The only thing to make it larceny is, that the prisoner put it in some place of deposit belonging to the master.

COLERIDGE J. Why must there be a specific place of deposit? Why may it not be his to keep for the use of his master?

(a) It might, and indeed must have been laid in the prisoner, if he had received it elsewhere than in his office, and had been robbed of it before he took it to the office. But when once taken to the office it could only be laid in the master. *R. v. Rudick*, 8 C. & P. 237.

Cockburn Q. C. The only evidence of his doing wrong is, that whereas he ought to have put it in some place of deposit, the evidence does not shew that he did so, *and the presumption is that he never did, but *23] destroyed it at once. So that the case is exactly the same as if one servant had handed it to another in the street, and that one had destroyed it.

3. Could he commit larceny? He was a share-holder in the company, having a joint interest in the property belonging to it. It is true that he was also a servant of the company; but the company consists of a great number of shareholders, not incorporated; and though by the statute they may sue and be sued in the name of their treasurer, there is a provision that all the other incidents of partnership should continue. True also that the concerns of the company are managed by a board of directors, and they are subdivided into different departments, and the prisoner is employed in one of those departments; but still he was a shareholder, and had a joint interest in the common concerns of the company. The cases shew that if a man has property in a chattel, and takes it from one having at the time a special property in it, that may be larceny; but then the taker must not at the time have the present right of possession. Here the prisoner has the present right of possession. He may be guilty of a breach of duty in not performing the duties of his office rightly; but he has the property, the possession, and the right of possession. In no instance has it been held that where another party has merely a prospective and future right to possession, an appropriation by a party having the actual right to possession is a stealing.

PATTESON J. So, if one of the other shareholders had taken it from the prisoner it might have been a larceny, because he had a special property.

Cockburn Q. C. Yes: the case against the prisoner is, that he stole from himself a chattel in which he had a *property, and also the present right of possession; for it is found that it was his business to [*24 keep the cheque till it was given up to his masters. In 2 Greaves' Russell, 87, the law on this matter is well stated. The general rule is that a man cannot commit larceny of the goods wherein he has a property. All the cases there put are exceptions to the general rule; but the exceptions are limited to where the party has neither the present right of possession, nor the present right of property, but somebody else has.

4. As to the service of the prisoner. He is charged as servant of the treasurer, as also of the directors, but not of the shareholders. It seems that the directors have the general management of the concerns of the company; they pay the servants, but out of the funds of the company, therefore they are the servants of the company, not of the directors. The prisoner is, in fact, an under-servant, and the directors are upper servants.

CRESWELL J. I don't think that appeared in evidence.

Cockburn Q. C. Then I will take it either way; his services are gratuitous or paid.

CRESWELL J. He is not charged as servant of the directors. He is charged as the servant of the treasurer, and of *Tite* and others, and of *Goldsmid* and others.

Cockburn Q. C. He was clearly not the servant of the treasurer, because he was paid out of the funds of the company. If *Tite* and others, or *Goldsmid* and others, means other directors, that is not a correct description, because he was the servant of the company. If it means other shareholders, that won't do, because it charges him as servant to himself. *Tertia nulla via.*

The *Attorney General* for the Crown.

1. This case must be treated as coming before the
 *25] *Court as a motion on the ground of misdirection,
 or as as a bill of exceptions. Therefore, both
 parties are bound by the case as stated, and the facts as
 found by the jury.

2. The conviction is impeached on three grounds.
First, that the crime is embezzlement, not larceny, be-
 cause the property was never in the possession of the
 masters. *Secondly*, that as the prisoner was a partner
 in the company he cannot be criminally liable. *Thirdly*,
 (which goes to the degree of the offence rather than to
 its nature,) that he was not a servant.

First. It is contended that under the circumstances of
 the case the cheque never was in the possession of the
 masters. The circumstances were these. The cancelled
 cheque was returned into the hands of the prisoner in
 the course of business, and he having so received it for
 the use of the directors, afterwards destroys it. The
 instrument is said to have been still *in transitu*, and that
 the crime was, therefore, embezzlement. *R. v. Murray*,
 1 Moo. C. C. 276, is expressly in point to show that it is
 larceny.

ALDERSON B.—Perhaps there is this objection to the
 test which I suggested, *viz.*, suppose the bankers had
 sent it in a letter instead of in a pass-book—that the
 letter would not have passed out of the possession of the
 writer till actually presented. The messenger would
 have been the agent of the bankers. But suppose a
 servant takes a letter out of a letter-box in the door of
 the house?

The *Attorney General*. Or put this case. I send my
 clerk to a bookseller to buy me a book; he brings it to
 my chambers, and gives it to my laundress; she appro-
 priates it. Is not that larceny? The clerk has attorned

to his master and done his duty. This is exactly the same case as *R. v. Murray*, 1 Moo. C. C. *276. [*26 For it is clear that the prisoner there received the money, not directly from his master, but from another clerk, who had the custody of it for the master, for the judgment is founded on the fact of the master having the possession of the money by the hands of such other clerk, and therefore the taking by the prisoner was not embezzlement, but larceny. The facts found in the case get rid of the supposed difficulty that the cheque was the property of the bankers. For the custom was for the bankers to return the cheques weekly to the company. In *R. v. Masters*, 1 Den. C. C. 332, there never was any such a possession by the master as to make the taking a trespass.

CRESSWELL J.—The distinction between the two cases seems to be this, that in *R. v. Masters* none of the servants had a duty to hand the money to the master, but only to pass it on to the other servants.

The *Attorney General*. Just so; and that distinction identifies *R. v. Murray* with the present case. The duty of the prisoner was to receive the cheque from the messenger; he does so, and then the bailment (if a bailment at all) being determined, he afterwards (that is, after getting possession of it in the usual way, and doing what it was his duty to do with it) destroys it. If a clerk or servant receives property, performs his duty by it, and then the bailment being determined, destroys it, he is guilty of larceny. If my clerk puts a book on the table, or even gets it into the house, it is enough.

CRESSWELL J.—You are, perhaps, going too far in saying that the prisoner did what it was his duty to do with the cheque in the first instance.

WILDE C. J.—If he had sufficient time to discharge his duty, it may be presumed that he did so.

*27] The *Attorney General*. There were six days.
*Further, the cheque was delivered into the office of the company. The property was perfect in the company, even by delivery to the person, and his receipt of it in the course of his duty.

CRESSWELL J.—I think there was no evidence whether or no the cheque had been drawn by the company, or that it had ever been the property of the company.

The *Attorney General*. Except that it was on the paper of the *Globe* Cheque Book.

ALDERSON B.—There were missing pages in the cheque book, but no evidence that this cheque came from the missing pages.

The *Attorney General*. Whether genuine or no, if the bankers gave it to the porter for the *Globe Company*, it is their property.

ALDERSON B. referred to *Chipcase's case*, 2 Greaves's Russell, 162, as an authority for holding the prisoner guilty of larceny.

The *Attorney General*. *Secondly*. It is said that the prisoner is not guilty either of embezzlement or larceny, because he was a shareholder in the company, and so had an undivided interest in the property. But a man may steal property in which he has a joint interest. A clerk of a friendly society may rob the society. *R. v. Hall*, 1 Moo. C. C. 474; *R. v. Jenson*, Ibid. 434.

PATTESON J.—In *R. v. Jenson*, it does not appear that the prisoner was a member of the bank. In *R. v. Hall* the prisoner is stated to have been a member, but no question arose on that fact: and although from the report of the judgment in *R. v. Hall* it would seem that *R. v. Jenson* was held to govern that case, I do not see how the point raised in the former case could have arisen in the latter.

*The *Attorney General* cited *R. v. Miller*, 2 Moo. C. C. 249. What is there to prevent the prisoner, though having an interest in the concerns of the company, from being liable on this prosecution? If the members of a company delegate to certain individuals the special right to the custody of the documents of the company, any member wrongfully appropriating such documents may be found guilty of larceny, though he may have a joint interest in the thing taken. This is so in the case of clubs; (a) the property is there laid to be in the steward. Then it is found that the directors have the charge and custody of all the papers, &c., and that the cheque was received by the prisoner for the use of the directors, for the terms of the summing up have been adopted by the jury in their verdict. [*28]

CRESWELL J.—I don't think you can argue from the summing up as distinct from the facts found.

The *Attorney General*. The Judge said, that to find a verdict of guilty, the jury must affirm all three propositions; and they did so.

Thirdly, Was he a servant? That is disposed of by the finding: he is found expressly to be so. It is a mere question of fact, not of law.

WILDE C. J.—Whom would he sue for his salary? Suppose the funds of the company fall short, whence is his salary to come?

The *Attorney General*. The prisoner was employed by the directors and paid by them: the source of the salary cannot affect the case. Servants often buy their places. Whose servant is the head waiter at the **Charing Cross Hotel*? He buys his place, and employs servants under him. [*29]

(a) See *R. v. Ashley*, 1 C. & K. 198, before the Recorder and Mr. Commissioner Bullock. The prisoner was acquitted, but not on the ground of his being a member of the club.

Cockburn Q. C. replied.

ALDERSON B. mentioned *R. v. Willis*, 1 Moo. C. C. 375.

Cur. adv. vult.

Afterwards, on the 22nd *June*, 1850, WILDE C. J., read the following judgment:

We have considered this case, and are all of opinion that the counts in the indictment, which charge the stealing a piece of paper, the property of *Goldsmid* and others, the masters of the prisoner, are supported by the evidence.

By the statement of the case, it appears that *Goldsmid* and others are the directors of the company, and that by its constitution they have the appointment and dismissal of the servants in the employ of the society, that they fix and pay their salaries, and also fix the duties they are to perform. The prisoner was a salaried clerk in the office. and, therefore, he was their servant.

They have also the ultimate charge and custody of the documents of the company: and by the course of business between the company and its bankers, the paid cheques were returned to the directors, were part of the company's documents, and became the vouchers of the directors, and their property as such directors. The paper in question was one of these. One of the prisoner's appointed duties, was to receive and keep for his employers such returned cheques; any such paper, therefore, in his custody would be in the possession of his employers. The paper in question, therefore, as soon as it had passed from the hands of the messenger, and arrived at its ultimate destination, the custody of the

*30] prisoner for the directors, was really in *their possession, and when he afterwards abstracted it for a fraudulent purpose, he was guilty of stealing it from them; as a butler who has the keeping of his master's

plate would be guilty of larceny, if he should receive plate from the silversmith for his master, at his master's house, and afterwards fraudulently convert it to his own use, before it had in any other way than by his act of receiving come to the actual possession of the master.

This case is distinguishable from those, in which the goods have only been in the course of passing towards the master, as in *R. v. Masters*, 1 Den. C. C. 332, where the prisoner's duty was only to receive the money from one fellow servant, and pass it on to another, who was the ultimate accountant to the master. Here, the paper found had reached its ultimate destination when it came to the prisoner's keeping, and that keeping, being for his masters, made his possession theirs.

In this view of the case, no difficulty arises as to part ownership, from the fact that the prisoner was a shareholder in the company,—as such he had no property in this paper.

See note to *R. v. Masters*, (1 Den. C. C. 332.)

*REGINA v. HENRY CRADDOCK.

[*31

An indictment in the first count charged *A.* with stealing a promissory note from the person of *B.*; in the second count with stealing a bank note from the person of *B.*; in the third count with receiving the aforesaid goods "*so as aforesaid feloniously stolen.*" *A.* was acquitted on the two first counts, and convicted on the last. *Held*, on application to arrest the judgment, that after verdict the indictment was not bad on the ground of repugnancy: because, (1), the words of reference in the third count did not necessarily import a stealing of the goods by *A.*; (2), if they did, that count did not thereby become intrinsically repugnant, but was conceivably capable of proof; and after verdict the Court would resort to any possible construction which would uphold the indictment against a purely technical objection.

At the General Quarter Sessions of the Peace, holden at *Hexham*, in *Northumberland*, on *Wednesday*, the 3rd

day of *July*, A. D. 1850, *Henry Craddock* was tried upon an indictment, of which the following is a copy:—

Northumberland (to wit.)—The jurors of our Lady the Queen upon their oath present, that *Henry Craddock*, late of the parish of *Alnwick*, in the county of *Northumberland*, labourer, on the thirteenth day of *May*, in the year of our Lord, one thousand eight hundred and fifty, at the parish aforesaid, in the county aforesaid, one promissory note for the payment of ten pounds, and of the value of ten pounds, and one piece of paper of the value of one penny of the property, goods, and chattels of *Robert Harvey*, from the person of the said *Robert Harvey*, the said sum of ten pounds, secured and payable by and upon the said promissory note, being then and there due, and unsatisfied to the said *Robert Harvey*, then and there feloniously did steal, take, and carry away against the form of the statute in that case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

Second count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that *Henry Craddock*:
 *32] *late of the parish aforesaid, in the county aforesaid, labourer, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, one bank note for the payment of ten pounds, and of the value of ten pounds, and one piece of paper of the value of one penny of the property, goods, and chattels of *Robert Harvey*, from the person of the said *Robert Harvey*, the said sum of ten pounds, secured and payable by and upon the said bank note, being then and there due and unsatisfied to the said *Robert Harvey*, then and there feloniously did steal, take, and carry away against the form of the statute in that case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

Third count.—And the jurors aforesaid, upon their oath aforesaid, do further present, that *Henry Craddock*, late of the parish aforesaid, in the county aforesaid, on the day and year aforesaid, at the parish aforesaid, in the county aforesaid, the goods and chattels aforesaid, so as aforesaid feloniously stolen, taken, and carried away feloniously did receive, and have then and there well knowing the said goods and chattels last aforesaid to have been feloniously stolen, taken, and carried away against the form of the statute in such case made and provided, and against the peace of our Lady the Queen, her Crown and dignity.

The jury found the prisoner not guilty upon the first and second counts, but guilty of receiving under the third count.

Upon this the counsel for the prisoner moved in arrest of judgment, because the jury had acquitted the prisoner of the stealing, and in the said last count it is stated that the prisoner did receive the same goods and chattels "*so as aforesaid feloniously stolen*," whereas the jury having found that he had not stolen *the same, [*33 they could not, under the third count, as it is worded, find him guilty of receiving the goods so alleged to be stolen by him.

The counsel for the prosecution contended that the words "*so as aforesaid*," in the count for receiving might be struck out as surplusage, which the Court refused to do.

The Court postponed judgment, and the prisoner was committed to the common gaol of the county until the decision of the Judges was given upon the case, unless he should find bail, himself in 40*l.*, and two sureties in 20*l.*, each, before the rising of the Court, or at any adjournment thereof.

The question for the opinion of this Court was—

Whether the prisoner was properly found guilty under the count for receiving as set forth in the indictment?

On *Friday 22nd November* A. D. 1850, this case was argued before POLLOCK C. B., WIGHTMAN J., V. WILLIAMS J., TALFOURD J., and MARTIN B.

Otter for the prisoner.

"So as aforesaid" is descriptive, and means "stolen by *H. Craddock* aforesaid." *R. v. Woolford and Another*, 1 M. & R. 384.

WIGHTMAN J.—Are those words necessarily descriptive of *all* the incidents of the stealing stated in the other counts, because if they are capable of being construed so as to avoid a repugnancy, the Court will give them a construction which will support the indictment rather than one which will vitiate it. The words do not seem to me necessarily to have the meaning which you suggest.

Otter. Words that are matter of description must be strictly construed, even though leading to a repugnancy which would be fatal to the indictment.

V. WILLIAMS J.—In *R. v. Woolford*, 1 M. & R. 384,
 *34] *there was no repugnancy; and here the fact of
 such a construction leading to a repugnancy might
 dispose the Court to hold the words not to be matter of
 description.

POLLOCK C. B.—The several counts are wholly independent of each other. The fact of the prisoner having been acquitted on the two first counts has no bearing whatever on the charge contained in the third, and it cannot be used as evidence on that count either for or against him. That count stands or falls on its own merits. If it must be taken to mean the goods so stolen by *Henry Craddock*, still if in *rerum natura* a man can possibly be a receiver of goods stolen by himself, which he clearly may be, then there is no objection to this indictment on

its face. Your objection being solely technical may be met by an answer equally technical. Assuming the count to allege the goods to have been stolen by the said *Henry Craddock*, then after verdict we must assume that such allegation was proved. It is quite immaterial that there may seem to be a contradiction on the face of the record owing to the acquittal on the other two counts. There is not necessarily a contradiction. The only question here is, ought the judgment to be arrested?

MARTIN B.—Suppose an indictment to contain two counts precisely identical; and an acquittal on one, and a conviction on the other: could the judgment be arrested? *R. v. Woolford*, 1 M. & R. 384, was a case of variance.

V. WILLIAMS J.—Why does not the third count mean “I said in the two first counts that the goods were stolen; and I say so again?”

WIGHTMAN J.—I see no necessity for construing the third count so as to create a repugnancy; after verdict the words must be construed *ut res magis valeat quam pereat*.

**Liddell*, for the Crown, was not called upon. [*35]

POLLOCK C. B.—The Court are all of opinion that the conviction is right. If we hold that the words must be construed as you suggest, then after verdict it must be taken that such a stealing was proved; if on the other hand, as some of the court think, the words need not be construed so as to create such seeming repugnancy the objection is wholly groundless. (a)

(a) On the construction of words of reference, see *R. v. Waters*, 1 Den. C. C. 356; *R. v. Martin*, 9 C. & P. 217; *Ness v. Bertram*, 4 Exch. Rep. 195; *Fletcher v. Posson*, 3 B. & C. 192; *Wills v. Sutherland*, 4 Exch. Rep. 211.

THE QUEEN *v.* GEORGE DADSON.

A., a constable employed to watch a copse, seeing *B.* wrongfully carrying away wood therefrom, calls to him to stop and on *B.*'s running away fires at and wounds him. *B.* had been frequently convicted summarily of the like offence; and by stat. 7 & 8 *Geo.* 4, c. 29, s. 39, such stealing after two summary convictions is a felony. The fact of these convictions, as well as of their legal incidents, was wholly unknown to *A.*

Held, that *A.* was rightly convicted of wounding with intent to do grievous bodily harm.

George Dadson was indicted at the *Kent* Summer assizes, A. D. 1850, for shooting at *William Waters*, with intent to do him grievous bodily harm.

It appeared that he, being a constable, was employed to guard a copse from which wood had been stolen, and for this purpose carried a loaded gun.

From this copse he saw the prosecutor come out, carrying wood which he was stealing, and called to him to stop.

The prosecutor ran away, and the prisoner having no other means of bring him to justice, fired and wounded him in the leg.

*36] *These were the circumstances under which the prisoner acted. It was alleged in addition that *Waters* was actually committing a felony, he having been before convicted repeatedly of stealing wood; but these convictions were unknown to the prisoner, nor was there any reason for supposing that he knew the difference between the rules of law relating to felony and those relating to less offences.

ERLE J. told the jury that shooting with intent to wound amounted to the felony charged, unless from other facts there was a justification. And that neither the belief of the prisoner that it was his duty to fire if he could not otherwise apprehend the prosecutor, nor the alleged

felony, it being unknown to him, constituted such justification.

Upon this the prisoner was convicted of felony, and let out on his recognizance to come up for judgment, if required.

The question for this Court was, whether this conviction was right?

On *November 26th*, A. D. 1850, this case was considered by WIGHTMAN J., TALFOURD J., V. WILLIAMS J., MARTIN B., and POLLOCK C. B., who gave the following judgment:—We all think the conviction right. The prisoner was not justified in firing at *Waters*, because the fact that *Waters* was committing a felony was not known to the prisoner at the time. He was therefore liable to be convicted, though the amount of punishment might deserve great consideration.

*THE QUEEN v. JOHN WILEY.

[*37

A. and *B.*, two thieves, were seen to come at midnight out of a house belonging to *C.*'s father, under the following circumstances.

A. carried a sack containing the stolen goods; *B.* accompanied him; *C.* preceded them, carrying a lighted candle. All three go into an adjoining stable belonging to *C.*, and then shut the door. Policemen enter the stable and find the sack lying on the floor tied at the mouth, and the three men standing round it as if they were bargaining; but no particular words were heard.

Held, by eight Judges to four, that on this evidence *C.* could not be convicted of receiving stolen goods; inasmuch as although there was evidence of a criminal intent to receive, and of a knowledge that the goods were stolen, yet the exclusive possession of them still remained in the thieves, and therefore *C.* had no possession, either actual or constructive.

At the General Quarter sessions for the county of *Northumberland*, holden at *Newcastle-upon-Tyne*, on the 26th day of *February*, A. D. 1850, *Bryan Straughan*,

George Williamson, and *John Wiley*, were jointly indicted under stat. 7 & 8 Geo. 4, c. 29, s. 54, for stealing and receiving five hens and two cocks, the property of *Thomas Davidson*. It was proved that, on the morning of the 28th day of *January*, in the same year, about half-past four, *Straughan* and *Williamson* were seen to go into the house of *John Wiley's* father with a loaded sack that was carried by *Straughan*. *John Wiley* lived with his father in the said house, and was a higgler, attending markets with a horse and cart. *Straughan* and *Williamson* remained in the house about ten minutes, and then were seen to come out of the back door, preceded by *John Wiley*, with a candle, *Straughan* again carrying the sack on his shoulders, and to go into a stable belonging to the same house, situated in an enclosed yard at the back of the house, the house and stable being on the same premises. The stable door was shut by one of them, and on the policemen going in they found the sack on the floor tied at the mouth, and the three men standing round it as if they were bargaining, but no words were *38] heard. The sack had a hole in it, *through which poultry feathers were protruding. The bag, when opened, was found to contain six hens, two cocks, and nine live ducks. There were none of the inhabitants up in the house but *John Wiley*, and on being charged with receiving the poultry, knowing it to be stolen, "he said he did not think he would have bought the hens."

The jury found *Straughan* and *Williamson* guilty of stealing the poultry laid in the indictment, and *John Wiley* guilty of receiving the same, knowing it to be stolen.

The Court told the jury that the taking of *Straughan* and *Williamson* with the stolen goods as above by *Wiley* into the stable, over which he had control, for the purpose of negotiating about the buying of them, he well

knowing the goods to have been stolen, was a receiving of the goods by him within the meaning of the statute.

The question for the opinion of the Court was, whether the conviction of *Wiley* was proper.

The three prisoners were again jointly indicted for stealing and receiving the nine ducks which were found in the sack mentioned in the last case, and upon the same evidence and the same direction by the Court. The jury again found *Straughan* and *Williamson* guilty of stealing, and *John Wiley* guilty of receiving the nine ducks, knowing them to have been stolen. The question for the opinion of this Court was, whether this second conviction was proper?

This case was argued on 27th *April*, A. D. 1850, before Lord CAMPBELL C. J., PARKE B., ALDERSON B., CRESSWELL J., and ERLE J.

Otter for the prisoners. The first statute on the subject of receiving is 3 *Wm. & Mary*, c. 9, s. 4, and that and all the subsequent statutes up to stat. 22 *Geo.* 3, c. 58, *make it felony to receive or buy. Stat. 7 & 8 *Geo.* 4, c. 29, s. 54, makes it a felony to receive [*39 only; it is, therefore, no longer a felony to buy unless there is also a receiving. *R. v. Hill*, 1 Den. C. C. 453, shows that there must be either an actual or a potential receiving. Here there was neither.

PARKE B.—You say that there must be a parting with the possession by the thief?

Otter. Yes; a joint receiving with the thief will not do; though a joint receiving with any one else will. The possession of the thief is inconsistent with that of the receiver. The question here is—can a person who takes a thief with stolen goods into a secret place for the purpose of negotiating about the purchase of them, knowing them to have been stolen, be thereby a receiver within the statute? *Farina v. Home*, 16 M. & W. 119, shews,

that to constitute an actual receipt of goods there must be a parting with the possession of them by the holder, and a delivery of them to the receiver.

PARKE B.—You say that he was intending to receive, but had not actually received them?

Lord CAMPBELL C. J.—Suppose he had said to the thieves, “let me take them into my hand, and see if they are fat,” and that the thieves had consented, but had said “mind you let us have them back again.” Would that be a receiving?

Otter. Yes; because they would have parted with the corporal possession of them. Potential possession must mean the having some control over the goods on the person in whose actual possession they were.

Liddell for the Crown.

1. Is there any question for this Court to decide?

There is *some* evidence of receiving at all events; for he had them in the house; and there is some evidence *that he had actually bought the cocks and the
*40] ducks, though not the hens.

2. What is meant by *potential* possession?

PARKE B.—Could the receiver have brought trover against the policeman if he had taken the goods wrongfully?

Liddell. The prisoner assisted in carrying the fowls: he lighted the thieves to the stable. Had he held the candle while the larceny was going on he would have been a principal in the larceny. Had he done so while a third party received them he would have been a principal receiver. He did more than evince an intent to receive. He in part received. His acts were, at all events, an inchoate receiving; therefore there was a receiving, though unsuccessful, because interrupted. No one was in the actual corporal possession of the goods,

they were lying on the ground before them. The law of vendor and vendee is not applicable.

Otter replied.

Cur. adv. vult.

On *Wednesday, 26th November, A. D. 1850*, this case was re-argued in the Court of Exchequer, before the twelve following Judges.—Lord CAMPBELL C. J., PARKE B., PATTESON J., ALDERSON B., MAULE J., COLERIDGE J., CRESSWELL J., ERLE J., PLATT B., V. WILLIAMS J, TALFOURD J., and MARTIN B.(a)

Otter for the prisoner.

The prisoner might have been an accessory after the fact; but he was not a receiver. 1 Hale, P. C. 618.

PARKE B.—I question very much whether he could have been indicted at common law as an accessory after *the fact, unless what he did was with a view of [*41 aiding the felon or furthering his escape.

Otter. The question is as to the meaning of the word *receiving*. The statutes taken together show that it is no longer an offence merely to buy; therefore the mere fact of admitting the goods with a view to buying them is not a receiving. *The property* remains in the prosecutor: the thief gets *the actual possession*, and nothing more. The word *receive* is to be constructed with a reference to the rights of all the parties who had any thing to do with the goods. The thief having no legal property in the goods can only pass *the actual possession*; and if he passes that, he has no possession left in him, and therefore has not even constructive possession, and so he cannot be taken to be holding the goods as agent for the prisoner. Therefore the prisoner cannot be held to have had *constructive possession*. It is doubtful whether mere naked

(a) The Judges had resolved that whenever the Court of Criminal Appeal, created by stat. 11 & 12 Vict. c. 78, were not unanimous, the case should be brought before the consideration of the whole Bench.

possession will entitle a party to maintain trover even against a wrong doer, (*per* Parke B., *Fyson v. Chambers*, 9 M. & W. 467) : here the prisoner had not even such possession ; and therefore if the right to bring trover be a test of receiving, it is clear that he is not a receiver. There must be a willing parting with the possession by the thief, and a willing taking on the part of the receiver.

LORD CAMPBELL C. J. Can there not be a joint possession between a receiver and a thief?

Otter. Receiving means something more than having possession. *R. v. Wade*, 1 C. & K. 739 ; *R. v. Hill*, 1 Den. C. C. 453.

LORD CAMPBELL C. J. The latter case shews that actual or *potential* possession is enough. There may be possession without corporal touch.

MAULE J. What is *potential* possession?

**Otter*. There must be a disposing power over
*42] the goods.

LORD CAMPBELL C. J. Suppose the thief and receiver to have at the same time the joint manual possession, will not that do?

ALDERSON B. Suppose there was a large bale, and A., a thief, had hold of one end of it; and B., a receiver, had hold of the other end, there would be actual possession in both ; here the question is only as to the *actual* possession ; that may be in two persons. *R. v. Parr*, 2 M. & R. 346.

We have to decide whether the direction to the jury is right. It is consistent with that direction that the thieves alone had actual possession at the time of going into the stable. For all the circumstances set out in the case are not to be taken as incorporated into the direction by the words " as above."

Liddell for the Crown.

The direction to the jury must be taken to incorporate all the circumstances set out in the case. On the other side the fallacy has been to confound *constructive* with *joint actual* possession. Here the prisoner had the latter with the thieves.

A man may be a receiver under the statute who would not be an accessory at common law, *e. g.* *A.*, a thief, gets *B.* to take stolen goods; *B.* knows that they are stolen. but thinks that *A.* is not the thief; he would be a receiver, though not an accessory, for he would not have the intent of aiding the thief. See definition of "receiving" in 2 East, P. C. 765; *R. v. Davis*, 6 C. & P. 178, *per* Gurney B.; *R. v. Richardson*, 6 C. & P. 336, *per* Taunton J.

The right to bring trespass or trover is inapplicable as a test, for the question here is, had the prisoner had possession or no; not what civil rights had he, sup- [*43
posing *him to have possession. Nor is there any question as to *constructive* possession, nor as to the right of property. At common law, receiving a felon would mean knowingly harbouring with a view to aid. Substitute the word goods, and the meaning will be the same, and so make a man a receiver under the statute. The object of all the statutes relating to receivers was to extend the subject-matter of the receipt, so as to include the goods stolen, as well as the receiver, thereby enlarging the definition of an accessory after the fact. In this case, the possession must be considered to be in all three prisoners. They are all treating it as a chattel in their possession and power; they were only undecided as to the mode of partition.

Lord CAMPBELL C. J.—If a man receives stolen goods for any purpose *malo animo*, knowing them to be stolen, is he not a receiver? Supposing the prisoner to have carried the sack, then he would have been a receiver; sup-

posing him to have carried the candle, in order to aid one of the thieves in carrying the sack, where is the legal difference? The act is a joint act. It is difficult to see why the prisoner had not joint possession of the sack as much as the other thief, who is not said to have had the manual possession. As to the word *potential*, I think that must be put out of consideration. I do not understand its legal meaning.

Liddell. *R. v. Rogers*, 2 Moo. C. C. 85; *R. v. Gerrish*, 2 M. & R. 219, shew that there may be a personal possession in *A.* without a manual possession by him.

MAULE J.—To make these cases applicable the money should have been stolen.

Otter replied.

The Judges retired to consider their judgment, and on their return, there being a difference of opinion, gave judgment *seriatim*.

*MARTIN B.—I think the conviction wrong.
*44] The question turns on the meaning of the word “receiving,” in stat. 7 & 8 Geo. 4, c. 29, s. 54. The true rule for the construction of statutes is stated by PARKE B., in *Becke v. Smith*, 2 M. & W. 195. “It is a very useful rule in the construction of a statute to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, but no further.” Upon the facts which are stated in this case I think the prisoner cannot be taken to have received the goods. The direction of the Judge can only be taken to refer to so much of the circumstances stated as relates to the taking into the stable, and the subsequent facts. And upon those facts it seems to me that *Straughan* and *Williamson* had

possession of the goods as vendors, and therefore adversely to *Wiley*, and never intended to part with the goods until the bargain was concluded.

TALFOURD J.—I think the conviction wrong. The possession of the thieves seems to exclude the notion of possession by the prisoner. I think the case only incorporates so much of the transaction as relates to the taking into the stable, and what occurred there.

V. WILLIAMS J.—I think the conviction right. I think the case made out against the prisoner, if he is proved to have had possession of the goods *malo animo* knowing them to be stolen. Here the knowledge and the *animus* are clear. The only question is as to the possession. I think it was only necessary for one of the party to have possession of the goods; the prisoner was proved to have had a common purpose with the thieves, although he had not the manual possession. They were all agents for each other, and the possession *of the thieves was, [*45 therefore, in law, the possession of the prisoner.

PLATT B—I think the conviction wrong. It seems to me that the goods must have been in such a condition as to be under the dominion of the prisoner, and exclusive of that of the thief. If they all are to be deemed in joint possession of them, the possession of the thieves would be different in kind from that of the receiver; for, in him it would be treated as a receiving, and in them as an asportation. I think that the thieves here retained the control and possession, and never intended to part with it until after their bargain was concluded.

ERLE J.—I think the conviction right on two grounds. *First*, The prisoner co-operated with the thieves in removing the goods into the stable *malo animo*, with the intent of bargaining there more securely. If he had actually carried them, there would then have been joint possession; what he actually did was legally equivalent to

carrying them himself. If *A.* steals goods, and *B.* afterwards assists him in carrying them, *B.* is not punishable as a thief; but if he be not punishable as a receiver either, there would be a failure of justice, arising out of the principles of constructive law. *Secondly*, I attach a wider meaning than some of my brethren to the word *receive*. The rules of the criminal and the civil law are in many respects different, and have little or no bearing on each other. The state of the common law with regard to receiving seems to show that the word must here be construed in a different sense to what it might bear in a case of vendor and purchaser. The common law failed to provide for the evil which the statutes were passed with the express view of meeting. They should, therefore, be

*46] construed with analogy to the word **harbouring* at common law in the case of the thief. Here the prisoner must be taken to be the owner of the stable, and he authorizes the thieves to deposit the property there. It makes no difference as far as his act is concerned that the thieves remain there with the property. The earlier statutes did not contemplate a bargain as being essential to a receiving. Stat. 29 *Geo.* 2, c. 30, s. 1, makes the crime consist in buying or receiving by suffering any door, window, or shutter to be left open, or unfastened between sun-setting or sun-rising for that purpose, or in buying or receiving the [goods], or any of them at any time in any clandestine manner from any person or persons whatsoever, &c." Compare stat. 21 *Geo.* 3, c. 69. So that evidently the Legislature then contemplated the case of there being no contract or bargain, or any direct communication between the thief and the receiver, but a mere deposit by the thief in some place belonging to the latter with his consent. In 2 East, P. C. 765, it is said. "In order to constitute a receiver, generally so called, it is not necessary that the goods should be actually pur-

chased by him ; neither does it seem necessary that the receiver should have any interest whatever in the goods : it is sufficient if they be, in fact, received into his possession *malo animo* ; as to favour the thief, or without lawful authority, express or to be implied from circumstances." It has also been twice laid down that there may be a receiving without any profit to be derived thereby to the receiver. *R. Davis*, 6 C. & P. 178, *per* GURNEY B. *R. v. Richardson*, 6 C. & P. 336, *per* TAUNTON J., S. C. 2 Russell on Crimes, 247. In my opinion the case submitted to this Court embodies all the circumstances there set forth.

CRESSWELL J.—I agree with V. WILLIAMS J., and ERLE J., in thinking this conviction right. The *direction of the Bench is the only thing to be considered. [*47 I think that direction must be to be taken to incorporate all the circumstances set forth in the case. And although I am inclined to agree with the observations of my brother ERLE with respect to the meaning of the word "receiving," I ground my opinion on the fact, that the prisoner was clearly co-operating with the thieves. If the goods had been removed by the thieves from one part of the owner's premises to another part of those premises and there left, and the prisoner had taken them from the latter place jointly with the thief, he would have been jointly liable as a thief. If then he assisted the thieves in taking them elsewhere, that was a joint taking by him, and as he did it *malo animo*, he was criminally co-operating with them, and, therefore, guilty of receiving.

MAULE J.—I think the conviction wrong.

COLERIDGE J.—I think the conviction wrong, because we must decide whether it be so or not upon the direction ; and the direction did not make it the duty of the jury to consider circumstances sufficient to establish the guilt of the prisoner, if all were found against him, and to these we have no right to add anything.

If the direction be construed strictly, it would limit us to consider only the effect of the facts of leading the two thieves with the stolen goods from the house to the stable, and into it, with the knowledge that the goods had been stolen, and the guilty purpose of buying them. But it is better for the sake of the argument, and, perhaps, more correct to consider it as including also all the circumstances under which the fowls were brought to the house and taken from it to the stable, but all beyond that is excluded. Among these circumstances are not included any previous *invitation or consent; not *48] even any consent is stated.

So considering the facts, the prisoner was guilty of being in the house with the thieves, having the goods in their possession, and helping them with the goods still in their possession to a place under his control, with the knowledge that they were stolen, and the guilty purpose of buying them, and so himself acquiring a possession distinct from that of the thieves, on a contingency which never happened.

Until that should happen he never intended to have a possession, nor is it found, in fact, that he had, nor did the thieves intend to admit him to any such possession, actual or constructive. No case of joint possession with them intermediately arises; it did not exist in fact; it is excluded by the common intention.

Now, I conceive that *receiving* imports possession, actual or constructive, and, therefore, that the verdict was wrong. I think it right to add my concurrence in what has fallen from my Brother MARTIN on the great importance of proceeding in all questions on the Criminal Law on broad grounds intelligible to the common sense of ordinary people. (a)

(a) The editor is indebted to the kindness of Mr. Justice COLERIDGE for a copy of the above judgment.

PATTESON J.—I think the conviction wrong. I don't consider a manual possession or even a touch essential to a receiving. But it seems to me that there must be a control over the goods by the receiver, which there was not here. How far the other circumstances stated in this case might affect the question, I don't think we need inquire, for, in my opinion, they are not brought before us for consideration. The case as submitted to us, does not put the matter on that ground. However, though I entertain some doubts on that point, *I am inclined to think that those additional facts would make [*49 no difference.

ALDERSON B.—I agree with the majority of the Judges in thinking this conviction wrong. I think that there may be a joint possession of goods in a thief and a receiver. But there was no evidence of that here. The case submitted to us does not embody all the circumstances of the transaction. The sack may have been on *Straughan's* back all the time during the taking into the stable; and it is that part of the transaction alone which I think was treated by the chairman as amounting to a receiving, and left by him to the jury as evidence of it. The thieves seem always to have had possession of the goods, and the prisoner to have had only the intention of receiving them, not the actual receipt. In all these cases boundary lines are matters of great nicety, and seem to unthinking persons to involve absurd and frivolous distinctions; but those who are practically acquainted with the administration of the law have daily experience of their necessity, and know that without them acts and principles essentially different from each other in nature and operation would be confounded together, and that cases like the present have a peculiar value, owing to their furnishing precise definite rules.

PARKE B.—I think the conviction wrong. We have

only to consider the precise point submitted to us in the case reserved. The taking "as above" was said by the chairman to amount to a receiving; that only incorporates so much of the transaction as relates to the taking of the goods into the stable. We must not therefore speculate on the question whether the three prisoners were all participating in the wrongful act, or what would be the legal consequences to each of their so doing. Receiving must mean a taking into possession actual or *50] constructive, which I do not think there was here. The prisoner took the thieves into the stable, but he never accepted the goods in any sense of the word except upon a contingency, which, as it happened, did not arise. I think the possession of the receiver must be distinct from that of the thief; and that the mere receiving a thief with stolen goods in his possession would not alone constitute a man a receiver.

Lord CAMPBELL C. J.—I think the conviction right. I concur in the reasoning of the minority of the Judges, and I think that there is a receiving whenever the prisoner knowing the goods to have been stolen, has possession of them *malò animo*. I think we need not enter into considerations respecting the right of property, or the right to bring trespass or trover. I think there need be no manual possession to constitute a receiving. The facts were that the sack was brought into the house, and taken thence to the stable with the knowledge and co-operation of the three prisoners. There was therefore a common criminal purpose. Was not *Williamson* then in possession of the sack? *Straughan* alone carried it, but it is agreed that for the purposes of larceny, the possession of *Straughan* was the possession of *Williamson*. If so, why was not the possession of *Straughan* equally the possession of *Wiley*? There was a criminal intent in all three at that time; and a co-operation for the pur-

pose of carrying that intent into execution. What difference can it make that one party alone had manual possession of the goods, when if they all had been on or near the owner's premises, such possession by one would have been clearly in law the mutual possession of them all? That there may be a joint possession in the thief and the receiver I have no doubt. Moreover, I think that on a fair interpretation of the case before us, we are asked our opinion of the whole transaction; and that *the circumstances set forth show that the goods were in the possession of *Wiley* quite as much as [*51 in that of the thieves. Therefore, in either view of the extent of the case submitted to us, I am of opinion that there was ample evidence of a receiving, and that the conviction was right.

THE QUEEN v. ARTHUR FERRALL.

A soldier was indicted for unlawfully and contemptuously refusing to comply with an order of Petty Sessions made under stat. 7 & 8 Vict. c. 101, s. 3, requiring him to pay a sum of money weekly for the maintenance of a bastard child.

Held, (1), that an indictment would lie; (2), that the offence was a "criminal matter" within the exception in statutes 11 & 12 Vict. c. 11, s. 52, and 12 & 13 Vict. c. 10, s. 52, (Mutiny Act), and therefore the fact of the defendant being a soldier was no defence.

At the Quarter sessions for the borough of *Maidstone*, held before Sir *Walter B. Riddell*, Bart., Recorder, on the 12th day of *October*, 1849, *Arthur Ferrall*, serjeant of dragoons, in her Majesty's service, at *Maidstone*, was tried for disobeying an order of two justices of the borough, made in Petty sessions, on 20th *July*, 1849, whereby they adjudged the defendant to be the putative father of a bastard child, born on the 23rd *April*, 1846, of *Ann*

Kennard, and ordered him to pay to her the sum of one shilling and nine pence per week, from the 11th day of *July*, 1849, together with the costs of the order.

The order was made under the act (for the Amendment of the Poor Law) 7 & 8 *Vict.* c. 101, s. 3.

The order was duly served, and on the 23rd *August*, 1849, *Ann Kennard* demanded payment of the amount then due, and the defendant refused, and said he did not intend to pay or to obey the order.

Upon that refusal no further proceedings under the act or the order was taken, but the defendant was *52] *charged with, and indicted for a misdemeanor in not paying the sum due as required by the order.

The indictment in the first count, after reciting the order, charged,—that the said order on the same 20th *July*, 1849, was duly served upon the said *Arthur Ferrall*, and he was required to obey the said order, but the said *Arthur Ferrall*, soldier, upon being so served with the said order as aforesaid, and being so required to obey the same as aforesaid, did not pay unto the said *Ann Kennard*, the mother of the said bastard child (she being then living, of sound mind, and not in any gaol or prison, or under sentence of transportation) the sum of one shilling and nine pence per week from the said 11th day of *July* then instant, the child being then and still living, and under the age of three years, and the said *Ann Kennard* then and still being a single woman, neither did the said *Arthur Ferrall* pay to the said *Ann Kennard* the sum of nine shillings and six pence, the costs mentioned in the said order, as by the said order he was required, but on the contrary thereof, he the said *Arthur Ferrall*, then and there unlawfully and contemptuously did neglect and refuse so to do, and he hath not since complied with the said order or any part thereof, although often required so to do in contempt, &c., and against the peace, &c.

The second count charged, "that the order of the said justices hereinbefore mentioned having been duly served, to wit, on the 20th day of *July*, 1849, aforesaid, afterwards, to wit, on the 23rd day of *August*, 1849, and after the expiration of one calendar month from the making of the said order, the said child being then living, and the said *Ann Kennard*, the mother, being then and still living, she the said *Ann Kennard* did personally demand of the said *Arthur Ferrall* payment of the sum of ten shillings *and six pence then due and owing for six weeks' maintenance of the said bastard child, [*53 being at the rate of one shilling and nine pence per week from the said 11th day of *July*, 1849, and also the sum of nine shillings and six pence, the amount of costs mentioned in the said order in obedience to the said order, but the said *Arthur Ferrall*, of, &c., soldier, upon such demand, and being so then and there required to make such payment as aforesaid, did not pay the said sums or either of them, or any part thereof, as by the said order he was required, but on the contrary, he unlawfully and contemptuously did neglect and refuse so to do, and he hath not since complied with the said order or any part thereof, although often required so to do in contempt, &c., and against the peace," &c.

At the trial, evidence was given of the order, the service of it, and the demand and refusal of payment.

The prisoner was not defended by counsel, but referred to the 52nd section of the Mutiny Act, (12 & 13 *Vict. c. 10*, s. 52) whereby it is enacted, that no person enlisted in "her Majesty's service shall be liable to be arrested or taken therefrom by reason of any warrant of any justice or other process for not supporting or leaving chargeable any wife or child, legitimate or illegitimate, or by any process or execution whatsoever (except upon affidavit

of debt exceeding 30*l.*, &c.) *other than for some criminal matter.*"

The learned Recorder directed the jury, that if they were satisfied with the evidence they should find the prisoner guilty, and mentioned that if it should become necessary he should take the opinion of the Judges upon certain questions of law in this case.

The jury returned a verdict of guilty.

The Recorder respited the Judgment till the next sessions, taking bail for the prisoner's appearance there.

*54] *The questions reserved were,

First. Whether the indictment could be sustained?

Second. Whether, if it could, a sentence of fine or imprisonment or both could be effectually carried into execution against the defendant, a soldier, having regard to the provisions of the act, 12 & 13 *Vict.* c. 10, s. 52?

This case was argued on *Wednesday*, 20th *November*, 1850, before POLLOCK C. B., WIGHTMAN J., TALFOURD J., V. WILLIAMS J., and MARTIN B.

Welsby appeared for the prisoner, and no one appearing on behalf of the prosecution he discussed the matter generally.

First. Can the indictment be sustained? This is an indictment at Common Law, and there are so many precedents of indictments for disobeying an order of justices, that I think it clear that an indictment will lie.

POLLOCK C. B.—Will an indictment lie for disobeying an order of a County Court Judge? There is an obvious distinction between a nonpayment of money and a refusal to do some act, such as being sworn in as a constable, or doing some other act of a public nature. Suppose the party to be unable to pay the money, is his refusal criminal?

Welsby. The case really turns upon the construction of stat. 12 & 13 *Vict.* c. 10, s. 52 (Mutiny Act). Stat. 11 & 12 *Vict.* c. 11, s. 52, was the first act containing a provision respecting a soldier's non liability to arrest for not supporting his illegitimate children. The intention of this provision in the Mutiny Acts clearly is, that the Queen should not be deprived of the services of a soldier by any process, &c. other than that which is awarded in respect to some criminal act. The words "criminal matter" in s. 52, are illustrated *by the provision [*55 of stat. 10 & 11 *Vict.* c. 12, s. 81. This is not such a criminal proceeding as is there spoken of, it is merely a mode of enforcing the payment of a debt. This indictment, which is to be followed by imprisonment, is *process* within the meaning of stat. 12 & 13 *Vict.* c. 10, s. 52. The execution of a judgment is process; the statute says "any process or execution whatsoever."

WIGHTMAN J.—Why must imprisonment follow upon the order of justices? The question does not seem to arise till imprisonment; there may be only a fine.

POLLOCK C. B.—Can a man be indicted for the non-payment of a fine?

Welsby. Perhaps he can. But as this is a proceeding which may have the effect of depriving the Queen of the soldier's services, the Court will stop it *in limine*, and declare that no indictment will lie; for stat. 12 & 13 *Vict.* c. 10, s. 52, declares that no soldier "shall be liable to be taken out of her Majesty's service by any process, order, or execution," &c.

V. WILLIAMS J.—Suppose this man to quit the service before imprisonment? In that case, why should not this be good process? The act only says, he shall not be liable to be taken out of the Queen's service.

TALFOURD J.—Suppose he was bound to repair a high-

way *ratione tenuræ*, and did not do so; would he not be liable to be indicted?

Welsby. The mischief intended to be guarded against was the liability to imprisonment.

TALFOURD J.—The same argument would prevent him from being liable to an action in a County Court, for imprisonment may be the result of such action.

Welsby. True, but imprisonment is neither the necessary nor the natural result of such action. But here the *56] necessary result of the indictment is arrest in *the first instance, and the natural result of it may be imprisonment. *Cur. adv. vult.*

On 20th December, 1850, POLLOCK C. B., delivered the following judgment. (a)

The Court are of opinion that the conviction was right. The authorities are clear upon the point, that an indictment will lie for a refusal to comply with an order of justices for the payment of money; and although I individually should not be disposed to hold, for the first time, that such a refusal was indictable since a like refusal to comply with an order of a superior Court is not so, yet, I feel bound by the authorities to concur with the rest of the Court in this view of the law. The subject of this indictment must, therefore, be regarded as *a criminal matter*, within the exception in stat. 11 & 12 Vict. c. 11, s. 52, and stat. 12 & 13 Vict. c. 10, s. 52; and the fact of the defendant being a soldier is, therefore, no legal objection to the proceedings. (b)

Stat. 10 & 11 Vict. c. 12, s. 11.

And be it enacted that nothing in this act shall be construed to extend to exempt any officer or soldier from being proceeded against by the ordinary course

(a) The other Judges present were MAULE J., CRESSWELL J., V. WILLIAMS J., and TALFOURD J.

(b) *Vide R. v. Brisby*, 1 Den. C. C. 416.

of law; and that if any commanding officer shall neglect or refuse, on application being made to him for that purpose, to deliver over to the civil magistrate any officer or soldier under his command accused of any crime or offence against the person, estate, or property of any of her Majesty's subjects which is punishable by the well known laws of the land, or shall wilfully obstruct, neglect, or refuse to assist the officers of justice in apprehending any officer or soldier under his command accused as aforesaid, such officer shall, upon conviction thereof in any of her Majesty's superior Courts at *Westminster, Dublin, or Edinburgh*, be deemed to be thereupon cashiered, and shall be thenceforth *utterly disabled to have or to hold any civil or military office or employment in the [*57 United Kingdom of *Great Britain and Ireland*, or in her Majesty's service; and a certificate thereof, containing the substance and effect of the indictment only, omitting the formal part, with the copy of the entry of the judgment of the Court thereon, shall be transmitted to the Judge Advocate General in *London*.

Stat. 11 & 12 *Vict. c. 11*, s. 52.

And be it enacted, that no person whatever enlisted into her Majesty's service as a soldier, shall be liable to be arrested or taken therefrom, by reason of the warrant of any justice or other process, for not supporting, or for leaving chargeable on any parish, township, or union, any wife, or any child or children, legitimate or illegitimate, or (except in the case of an apprentice) on account of any breach of contract or engagement to serve or work for any employer; and no person enlisted as a soldier or serving as a non-commissioned officer or drummer on the permanent staff of the disembodied militia, shall be liable to be taken out of her Majesty's service *by any process or execution whatsoever other than for some criminal matter*, unless an affidavit shall be made by the plaintiff, or some one on his behalf for which no fee shall be taken, before some Judge of the Court out of which such process or execution shall issue, or before some person authorized to take affidavits in such Courts, of which affidavit a memorandum shall, without fee, be endorsed upon the back of such process, that the original debt for which the action has been brought or execution sued out, amounts to the value of thirty pounds at least over and above all costs of suit in the action or actions on which the same shall be granted; and any Judge of such Court may examine into any complaint made by a soldier, or by his superior officer, and by warrant under his hand discharge such soldier without fee, he being shewn to be duly enlisted, and to have been arrested contrary to the intent of this act, and shall award reasonable costs to such complainant, who shall have for the recovery thereof the like remedy as would have been applicable to the recovery of any costs which might have been awarded against the complainant, in any judgment or execution as aforesaid: provided that any plaintiff, upon notice of the cause of action first given in writing to any soldier, or left at his last quarters or place of residence before such listing, may file a common appearance in any action to be brought for or upon account of any debt whatsoever, and proceed therein to judgment and outlawry, and have execution other than against the body.

Stat. 12 & 13 *Vict. c. 10*, s. 52.

And be it enacted, that no person whatever enlisted into her Majesty's service as a soldier shall be liable to be arrested or taken therefrom, by reason of the warrant of any justice or other process, for not supporting, or for leaving chargeable on any parish, township, or union, any wife or any child or children, legitimate or illegitimate, or (except in the case of an apprentice) on account of any

breach of contract or engagement to serve or work for any employer; and no person enlisted as a soldier or serving as a non-commissioned officer or drummer *58] on the permanent staff of the disembodied militia, *shall be liable to be taken out of her Majesty's service, *by any process, order, or execution, issued out of or from any county or inferior Court, or by any Judge or officer thereof, either for contempt of Court or otherwise, or by any process or execution whatsoever, other than for some criminal matter*, unless an affidavit shall be made by the plaintiff or some one on his behalf, for which no fee shall be taken, before some Judge of the Court out of which such process or execution shall issue, or before some person authorized to take affidavits in such Courts, of which affidavit a memorandum shall, without fee, be endorsed upon the back of such process, that the original debt for which the action has been brought or execution sued out amounts to the value of thirty pounds at least, over and above all costs of suit in the action or actions on which the same shall be grounded, and any Judge of such Court may examine into any complaints made by a soldier, or by his superior officer, and by warrant under his hand discharge such soldier without fee, he being shewn to be duly enlisted, and to have been arrested contrary to the intent of this act, and shall award reasonable costs to such complainant, who shall have for the recovery thereof the like remedy as would have been applicable to the recovery of any costs which might have been awarded against the complainant in any judgment or execution as aforesaid, provided that any plaintiff, upon notice of the cause of action, first given in writing to any soldier, or left at his last quarters or place of residence before such listing, may file a common appearance in any action to be brought for or on account of any debt whatsoever, and proceed therein to judgment and outlawry, and have execution other than against the body.

*59]

*THE QUEEN v. JOSEPH BARNES.

A., a servant, had authority in the absence of the chief clerk to buy kitchen stuff for his masters, and to make payment to the seller. The chief clerk was directed by the master to re-pay A. for such purchases upon the bare production by A. of a ticket containing a statement of such a purchase having been made. A. produces to the chief clerk a ticket containing a statement of a purchase which had not in fact been made; and thereupon the chief clerk paid him 2s. 3d.

Held, that A. was not indictable for larceny, but for obtaining money under false pretences.

Joseph Barnes was tried before *J. Deedes, Esq.*, Recorder, at the *October Quarter sessions*, A. D. 1850, for the city of *Canterbury* and county of the same, upon an indictment which charged that he being servant to *George*

Neame, and another, feloniously stole two shillings and three pence, the property of his masters. The prosecutors were grocers in the city of *Canterbury*, and the prisoner at the time of the alleged offence had been their servant about three years. They were in the habit of purchasing large quantities of what was called "kitchen stuff" to melt down. The course of business was for the sellers of the "kitchen stuff" to take it to the prisoner upon Messrs. *Neame's* premises. It was his duty to receive it and weigh it, and if the chief clerk was in the counting-house to give to the seller a ticket containing the date of the purchase, the weight, the price, the name of the seller, and the initials of the prisoner. The seller then took the ticket to the chief clerk, who paid him the price out of moneys furnished to him by the prosecutor for that purpose. In the absence of the chief clerk from the premises when any "kitchen stuff" was brought, the prisoner had authority himself to make the payment to the seller, and on afterwards producing to the clerk a ticket containing the above particulars he repaid the prisoner out of the moneys so furnished to him by the prosecutors. The clerk was instructed by Messrs. *Neame* to pay all demands made by the prisoner in this way, upon the production by him of the ticket, without any inquiry as to whether any stuff *had been really brought, or [*60 as to the quantity, or whether the alleged seller was or was not a customer of the firm. Upon the evening of the thirteenth of *September* the prisoner went to the chief clerk in the counting-house and demanded two shillings and three pence, which he said he had paid for eighteen pounds of "kitchen stuff." He produced a ticket in the usual form containing the name of *Scott* as the seller, and two shillings and three pence as the price, and received that sum from the clerk from the moneys so furnished to him, which the prisoner applied to his own

use. There had been no such dealing as that alleged by the prisoner, nor any such payment by him, nor had the prosecutor any customer of the name of *Scott*.

It was objected on behalf of the prisoner that this was not a felony, because the property in the money, and not the possession only, was parted with by the prosecutors, and that the indictment should have been for obtaining the money by false pretences, and *R. v. Witchell*, 2 East. Pl. Cr. 830, was relied upon.

The Recorder was of opinion, that although the facts might have supported an indictment for false pretences, yet that the prisoner, looking at the situation he filled as servant to the prosecutors, was guilty of felony, if the jury believed that he had obtained the money, knowing at the time that he was not entitled to receive it, and had applied it to his own use. The Recorder left the facts to the jury, who found the prisoner guilty, and he was sentenced to be imprisoned four calendar months, with hard labour, in the city gaol. The question for this Court was, whether the facts stated supported the indictment.

This case was considered by POLLOCK C. B., WIGHTMAN J., V. WILLIAMS J., TALFOURD J., and MARTIN B.

On 20th *December*, 1850, POLLOCK C. B. delivered the
 *61] *following judgment: (a)—The Court are of opinion, that as the clerk delivered the money to the prisoner with the intent of parting with it wholly to him, the latter was not liable to be indicted for a larceny, but only for obtaining money under false pretences. The conviction was, therefore, wrong. (b)

(a) The other Judges present were MAULE J., CRESSWELL J., V. WILLIAMS J., and TALFOURD J.

(b) *Vide R. v. Adams*, 1 Den. C. C. 38, and third Report of the Criminal Law Commissioners, pp. 9—14, 10th June, A. D. 1847.

[Under an indictment for stealing a horse, the jury were charged, that the question was, the intention to steal at the time of taking: an indictment for obtaining goods, &c. under false pretence would not lie, it seems, unless there were a consent of the owner to the taking. *The State v. Smith*, 2 Tyler, 272. False pretences and artifices in obtaining another's property *animo furandi*, will make larceny, provided it does not appear that a temporary trust or possession was extended to the party. *Wilson v. The State*, 2 Porter, 118.]

THE QUEEN v. DAVID WILLIAMS.

A. was indicted for forging a certain warrant, order and request in the words and figures following—(the instrument was then set out in full.) It was proved to be only a request.

Held, that as the instrument was set out in full, the description of its legal character was surplusage, and therefore caused no variance.

THE prisoner was tried before *W. N. Welsby, Esq.*, (sitting for Mr. Justice WILLIAMS) at the *Chester* Spring assizes, A. D., 1850 for forgery. The indictment charged the prisoner with forging, and in other counts with uttering, knowing the same to be forged, a certain warrant, order and request for goods with intent to defraud *William Bevan*. Other counts charged the intent to be to defraud *Edward Lloyd*.

It appeared in evidence that *Lloyd*, who is an ironmonger, in *Sydney Street, Manchester*, was in the habit of buying ironmongery goods from *Bevan*, who was a smith and iron-moulder at *Dukinfield, in Cheshire*. *Lloyd* had for some time before the commission of the offence employed the prisoner to sell goods for him on commission. On the 22d *December*, 1849, the prisoner presented to *Bevan* a paper in the following terms, which was proved to be a forgery of *Lloyd's* handwriting:—

prised all three qualities *of warrant, order, and request, all three must be proved. [*63

PARKE B. If it had been laid as one warrant, one order, one request, there would be no difficulty in the case; the prosecutor would have been put to his election. But you say that it is matter of description, and must therefore be proved as laid. We should see the indictment.

Lord CAMPBELL C. J. Was it not averred that he forged the following instrument, to wit, a warrant, order, and request, which instrument was then set out according to its tenor?

Mac Intyre. The indictment alleged it to be a certain warrant, order, and request in the words and figures following.

PARKE B. The question may be very difficult if the indictment sets out the instrument from what it would be if it merely described it in the terms of the statute. In the former case the matter which it is contended is descriptive may be mere surplusage, for when the instrument is set out on the record the Court are enabled to determine its character, and so a description is needless.

Cur. adv. vult.

On the 20th of *December*, A. D. 1850, POLLOCK C. B. (MAULE J., CRESSWELL J., V. WILLIAMS J., and TALFOURD J., being present) gave the following judgment.

This case has stood over in order to enable the Court to see a copy of the indictment. The Judges find that the instrument was set out in *hæc verba*, and therefore the only ground of doubt being removed, the conviction must be affirmed. (a)

(a) The principle of this decision seems to be, that where an instrument is described in an indictment by several designations, and then set out according to its tenor, either with or without a *videlicet*, the Court will treat as surplusage

*64]

* Copy of Indictment.

Cheshire, (to wit).—The jurors for our lady the Queen upon their oath present that *David Williams*, late of the township of *Dukinfield*, in the county of *Chester*, labourer, on the twenty-second day of *December*, in the thirteenth year of the reign of our Sovereign Lady *Victoria*, at the township aforesaid, in the county aforesaid, feloniously did forge a certain warrant, order, and request, for the delivery of goods, which said forged warrant, order, and request is in the words, letters, and figures following, that is to say,

“*Sidney Street*, 22nd Dec. 1850.

Mr. *Bevan*,—S. Pleas to sen by bearer a quantity of basket nails a clasp
for E. Lloyd.”

with intent to defraud one *Samuel Bevan*, against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity.

Second count, for offering, uttering, disposing of, and putting off a certain other forged warrant, order and request for the delivery of goods which said last mentioned forged warrant, order, and request is in the words, letters, and figures following, that is to say—(setting it out as above.)

Third count, for forging a certain other warrant, order, and request for the delivery of goods, with intent, &c.

Fourth count, for offering, &c., a certain other forged warrant, order, and request, as in count 3.

(Fifth, sixth, seventh and eighth counts corresponding to the above.)

*65]

*THE QUEEN v. EDWARD AMOS.

A building twenty-four feet square, with wooden sides, glass windows, slated roof, and commonly called the workshop; used as a storehouse for seasoned timber, as a place for the deposit of tools, and for the working up of timber may be described as a “shed,” in an indictment under stat. 7 & 8 Vict. c. 62, s. 1.

THE prisoner was tried before Mr. Justice TALFOURD,

such of the designations as seem to be misdescriptions, and treat as material only such designations as the tenor of the indictment shews to be really applicable. And where the indictment is so drawn as to enable the Court to treat as material only the tenor of the instrument itself, all the descriptive averments may be treated as surplusage. The principal case seems reconcileable with *R. v. Newton*, 2 Moo. C. C. 59, but to overrule *R. v. Williams*, 2 O. & K. 51; *Vide Bristol v. Wright*, Dougl. 66; S. C. Smith's Leading Cases, 2nd ed. p. 232.

at the *January* sessions, 1851, of the Central Criminal Court, for arson.

The building, which he was charged with burning, was described in one count of the indictment as "a warehouse"—in a second as "an office"—in a third as "a shop"—in a fourth as "a shed"—and in a fifth as "a building used for carrying on a certain trade, that is to say, the trade of a builder."

The building destroyed by fire stood on premises at *Clapham*, belonging to a gentleman who had been in the army, and was styled "Captain *Ross*." Possessing considerable freehold estate there, he employed his capital in building houses thereupon, of which from twenty to thirty were in the course of erection, himself providing the materials and superintending the work, which was performed by persons sometimes under contracts with him, and sometimes directly employed by him; but always with his own materials. His object was to let the premises or sell and convey them as he could find purchasers.

The building was erected by him four or five years ago for the convenience of the works. It was twenty-four or twenty-five feet square, its sides of wood, with glass windows, its roof slated, and it was commonly called "the workshop." It was used as a storehouse for seasoned timber, as a place of deposit for tools, and a place where timber was worked up into proper forms and prepared for use.

At the time of the fire, this building contained timber *prepared for use, which being burnt with it, made the owner's loss amount to more than a thousand pounds. [*66

On the part of the prisoner, it was contended that the building destroyed did not answer either of the descriptions of "warehouse," "office," "shop," or "shed," and

that the use of it by Captain *Ross* was not a use in a trade of a builder.

The jury found the prisoner guilty, and, in answer to a question put to them by the learned Judge, found that Captain *Ross* had been and was at the time of the fire in the habit of employing his capital in the building of houses on his own land, and of purchasing and working up timber and other materials in their erection for his profit and gain, and that the building destroyed was, at the time of the fire, employed by him for such purposes.

The learned Judge respited the judgment, and reserved the question, whether the building destroyed answered the description in either count of the indictment.

On *Saturday*, 18th *January*, A. D. 1851, this case was argued before JERVIS C. J., PATTESON J., CRESSWELL J., ERLE J., and MARTIN B.

Pulling for the prisoner.

The special facts found by the jury after the verdict of guilty must be excluded from consideration. They are in the nature of a special verdict, delivered subsequently to a general verdict of guilty.

ERLE J.—I take a verdict not to be complete till it has been accepted as a verdict by the Judge.

JERVIS C. J.—The Court cannot reject that part of the case; we must deal with it in the shape in which it is submitted to us.

Pulling. It does not appear from the case that Captain* *Ross* carried on the trade of a builder within
 • *67] the meaning of the stat. 7 Wm. 4 & 1 Vict. c. 89,
 s. 3.

MARTIN B. referred to *Stuart v. Sloper*, 4 Exch. 700.

Pulling. That case goes further than the present; for *Stuart* had both bought and sold, and yet he was held not to be a builder. The act of Parliament contemplated

the case of manufactories or warehouses for merchandise, not mere private places of deposit.

ERLE J.—Do you go the length of saying that the Legislature intended to leave the property of persons who are not within the Bankrupt Laws unprotected?

Pulling. The building is not a “warehouse.” It has been held that warehouses do not mean mere repositories for goods, but places where traders keep their goods for sale, in the nature of shops. *R. v. Godfrey*, 1 Leach, C. C. 3rd ed. 135. *R. v. Hill*, 2 M. & R. 458.

JERVIS C. J.—What do you say about the word “shed?”

Pulling. That word is only used in stat. 7 & 8 *Vict.* c. 62, s. 1, and must be taken in connection with the other buildings there specified, namely, farm-buildings, which the building in question is not. Besides, a shed is essentially a building different in structure from the one in question. *R. v. Munson*, 2 Cox, C. C. 186. Nor is it a shop. *R. v. Sanders*, 9 C. & P. 79.

Garde, for the Crown, was not called upon.

JERVIS C. J.—We need not determine whether the building in question answers the description of it given in each and all of the counts in the indictment. If it come within any one of them it is sufficient. I think that it comes within the meaning of the term “shed” in stat. 7 & 8 *Vict.* c. 62, s. 1. The second section of that statute relates to farm produce, but the first section evidently comprises buildings other than farm buildings; and, in my opinion, comprehends the building in question.

*PATTESON J.—This is certainly a shed. It is a temporary building; it has a covering, and whether it be slight or no is matter of opinion. I am inclined to think it is a building used in carrying on

[*68

trade, within stat. 7 Wm. 4 & 1 Vict. c. 89, s. 3, but that it is unnecessary here to determine.

CRESSWELL J.—The stat. 7 & 8 Vict. c. 62, s. 1, does not say “shed, or fold, or any *other* farm-building,” but “shed, or fold, or any farm-building;” thereby shewing that the shed need not be used for farming purposes. I think this is a shed within the meaning of the statute.

ERLE J.—I think that this is at all events a shed; and am disposed to hold that it falls within some of the other descriptions given to it in the indictment; but we need not consider that here.

MARTIN B. concurred.

R. v. MORTIMER KEALEY.

A. was indicted for a common law misdemeanor in unlawfully attempting by false pretences made to “*B. and Others*,” unlawfully to obtain goods the property of the said *B.* and others, with intent thereby to cheat the said *B.* and others of the same.

It was proved that *B.* was one of a firm, and that the pretences were made to *B.* alone, though with intent to defraud the firm.

Held, (1). That the words *and others* in the averment of the pretences need not be taken to mean *B.* and his partners, since such a construction would make the indictment bad in arrest of judgment. (a)

(2). That those words were surplusage, and might be rejected, and that therefore there was no variance.

Semble, per JERVIS C. J. If the words “*B. and others*,” were construed to mean *B.* and others not partners, proof of pretences to *B.* alone would be sufficient.

Semble, per ERLE J., that on such a construction being adopted, evidence of pretences to any others but *B.* would be irrelevant, and therefore inadmissible.

Semble, per MARTIN B., that if the words “*B. and others*” were construed to mean the firm, the proof as given was correct, and the objection of variance groundless.

At a General Session of gaol delivery, holden for the jurisdiction of the Central Criminal Court, on
*69] *Monday, the tenth day of June, in the year of

(a) *Quære*, whether it would not be cured by verdict?

our Lord 1850, *Mortimer Kealey* was tried before *Russell Gurney*, Esq. Q. C., upon an indictment charging him with the common law misdemeanor of attempting to obtain goods by false pretences, and to defraud the owners thereof contrary to the statute.

The indictment charged that the defendant made the pretences set forth in the indictment to *John Baggally and Others* with intent to obtain and defraud them of the goods in question, their property.

John Baggally and Others were partners in trade, and it appeared in evidence that the defendant, in fact, made those pretences to *John Baggally*, one of that firm, but that Mr. *Baggally* refused to part with the goods sought to be obtained in consequence of information regarding the defendant received from another person. It also appeared that none of Mr. *Baggally's* partners were present when the pretences were made, and there was no evidence of the false pretences having ever reached the ears of any one of them.

It was objected on the trial, that the proof did not support the averment in the indictment of the pretences having been made to *John Baggally and Others*, that the variance was fatal, and the prisoner entitled to his acquittal.

The learned Judge overruled the objection, and the defendant was convicted.

Judgment was postponed, and the above case reserved for the opinion of this Court. The defendant was committed to the custody of the keeper of *Newgate*, until the next session, unless he previously entered into recognizances, himself in 200*l.* and one surety in 200*l.*, or two sureties in 100*l.* for his appearance at the said next session to receive judgment.

*70]

*(Copy of Indictment.)

Central Criminal Court, (to wit).—The jurors for our lady the Queen, upon their oath present that *Mortimer Kealey*, late of the parish of *St. Mary the Virgin, Aldermanbury*, in the city of *London*, labourer, being an evil disposed person and in needy circumstances, and seeking to get his living by fraudulent and dishonest practices, did on the tenth day of *May*, in the year of our Lord one thousand eight hundred and fifty, with force and arms at the parish aforesaid, in the city aforesaid, and within the jurisdiction of the *Central Criminal Court*, unlawfully, fraudulently, and deceitfully falsely pretend to *John Baggally and Others*, that he was a member of a certain firm carrying on business in *Galway*, in *Ireland*, by and under the name, style, and firm of "*Kealey and Company*," that the said last mentioned firm of "*Kealey and Company*" was then in solvent circumstances, and had then, to wit, on the tenth day of *May*, in the year of our Lord one thousand eight hundred and fifty, a balance in its favour of two thousand pounds: by means of which said false pretences the said *Mortimer Kealey* did then and there unlawfully attempt and endeavour unlawfully to obtain from the said *John Baggally and Others*, one thousand yards of silk, one thousand dozen pairs of gloves, one thousand yards of ribbon, and one thousand grosses of buttons of great value, to wit, of the value of eighty pounds then and there respectively being the property of the said *John Baggally and Others*, with intent then and there to cheat and defraud them the said *John Baggally and Others* of the same. Whereas, in truth and in fact, the firm of *Kealey and Company*, of which the said *Mortimer Kealey* was a member as aforesaid, was not then in solvent circumstances. And whereas, in truth and in fact, the said firm of *Kealey and Company* had not at the time the said *Mortimer Kealey* so falsely pretended as aforesaid a balance in their favour of two thousand pounds as the said *Mortimer Kealey* well knew, to the great damage of the said *John Baggally and Others*, against the form of the statute in such case made and provided, and against the peace of our lady the Queen her Crown and dignity.

On *Saturday*, 18th *January*, A. D. 1851, this case was argued before JERVIS C. J., PATTESON J., CREESSWELL J., ERLE J., and MARTIN B.

Parry for the prisoner.

*71] *There is a fatal variance between the pretences laid and those proved. The pretences laid

were to *Baggally and Others*, those proved were to *Baggally* alone. *First*, the allegation of the pretences is material, and should be laid according to the fact. *Secondly*, even if not material, it should be proved as laid. On the first point, the object of stating the pretences in the indictment, is to give notice to the prisoner of the charge preferred against him. The evidence showed that the prisoner made the pretences to *Baggally* alone, and that *Baggally* knowing something of him would not trust him; the false pretences were not made in the presence or hearing of any of the other partners.

PARTESON J.—The indictment alleges the intent correctly. By stat. 7 Geo. 4, c. 64, s. 14, the firm may be described *Baggally and Others*.

JERVIS C. J.—That statute does not apply to the allegation of the pretences. The indictment states the pretences to have been made to *Baggally and Others*, not to *Baggally* and the other partners; and it is not stated in the case that other persons, not partners, were not present, when the pretences were made. So the only question is, whether, if the attempt proved was to get the goods of the firm, pretences made to *Baggally*, in the presence of strangers would not be sufficient.

MARTIN B.—How would it be, if the pretences had been made to the clerk?

Parry. That would be sufficient, if so laid.

JERVIS C. J.—The case does not convey quite an accurate notion of the indictment. It would seem from the case, that the pretences were stated in the indictment to have been made to *Baggally* and the other partners; but the indictment does not necessarily mean that.

*ERLE J.—Your objection is in substance, that the indictment charges the pretences to have been made to *John Styles*, and the evidence proves them to have been made to *John Nokes*. [*72

PATTESON J.—Why should not the words “and others” in the allegation of the pretences be struck out?

CRESSWELL J.—Suppose the indictment alleged the false pretences to be made to *A. B. & C.*, with intent to defraud *D.*, that would not necessarily mean that the pretences were made to all the three jointly. Proof of a false pretence to any one would be sufficient.

JERVIS C. J.—The whole of a false pretence need not be proved.

MARTIN B.—Suppose an averment in a declaration that an application was made to *A. & B.*, partners, to purchase goods, and proof of an application to *A.* alone, would not that be sufficient? Then, suppose that the averment in the indictment respecting the false pretences be taken to mean, that they were made to *Baggally* and the partners, would the proof here given constitute a variance? For the question of variance is all that we have to consider.

PATTESON J.—Suppose the pretences laid to have been made to *Baggally and Others*, and the word “others” to have been omitted in the subsequent part of the indictment, would not proof of a pretence to *B.* alone be sufficient?

JERVIS C. J.—Suppose pretences laid to have been made to *A. B. & C.*, and *B. & C.* called as witnesses and to prove that they did not hear any pretences made, would the case fail?

ERLE J.—Is there such a thing as a joint false pretence? If three persons are present, must they not each
 *73] deal with the pretence severally, each *applying to it his own individual faculties? Can there be a concerted hearing of a false pretence as there may be a concerted making of a false pretence?

CRESSWELL J.—Suppose a firm trading under the name of *John Thompson*, without any addition; *John Thompson*

is one of the partners ; a letter is addressed to him with the intent of defrauding the firm ; could it not be laid as addressed to *John Thompson and others* ?

MARTIN B.—Suppose a letter addressed to Messrs. *Child*, and no person of the name of *Child* in the firm ; one of the partners opens it, and he alone sees it ; could you not lay it as addressed to the firm ?

Purry. No : It should be laid according to the actual facts ; and if necessary it should be explained by suitable averments.

CRESSWELL J.—As to the notice to the prisoner, he cannot be held to have been misled by the word “others,” even if it were proved that the pretences were made to *Baggally* alone.

Purry. Suppose the indictment set out the names of the other partners as well, and the prisoner knew that the pretences were not actually made to any of the others, would you hold that proof of a pretence to one alone was enough ?

CRESSWELL J.—Yes.

JERVIS C. J.—In a declaration in slander, an averment that the words were spoken in the presence and hearing of divers subjects of our lady the Queen need not be proved as laid. (a)

PATTESON J.—If *Baggally and Others* be taken in the allegation of the pretences to mean the firm, then the indictment is bad in arrest of judgment ; for the stat. 7 *Geo. 4, c. 64, s. 14, does not authorize that mode of description in that part of the indictment. We [*74 may therefore take it to mean *Baggally* and the other persons, not partners.

Purry then proposed to move in arrest of judgment ; but on referring to the stat. 11 & 12 Vict. c. 78, found

(a) If words are laid to be spoken before A. and others, it is sufficient to prove them spoken in the presence of others only. Bull. N. P. 6.

that such a course was not open to him before this Court, as the case only reserved the point as to the variance.

(In the course of the argument, *Masters v. Barrets*, 2 C. & K. 715; *Bristow v. Wright*, Douglas, 665; *S. C.*, 1 Smith's Leading cases, 2nd edit. 324, &c.; *R. v. Mason*, 2 T. R. 581; *R. v. Perrott*, 2 M. & S. 379; *R. v. Douglas*, 1 Campb. 212; *R. v. Plestow*, 1 Campb. 494, were cited.)

No Counsel appeared on behalf of the Crown.

JERVIS C. J.—I am of opinion that this conviction was right. The averment of the pretences may be viewed in three ways. The words "*Baggally and Others*" may either mean "*Baggally* and the rest of the firm," in which case we should have to consider whether a pretence made to one partner alone may be laid as made to the whole firm; or they may mean *Baggally* and other persons, not belonging to the firm, in which case I think proof of a pretence to *Baggally* alone would be sufficient; or, which is, I think, the correct view, the words "and others" may be rejected as surplusage, and the objection of variance thereby removed.

PATTESON J.—I concur. I think we cannot take the words "and others" to mean "the other partners;" they have therefore no definite meaning at all, and must be rejected as surplusage.

CRESSWELL J., concurred.

ERLE J.—I think that the allegation of a pretence to *Baggally and Others* only admitted proof of *a
*75] pretence to *Baggally* alone; it would perhaps have been different if the pretence had been laid as made to two persons, *A. & B.* by name; proof of a distinct several pretence to each might then have been required.

MARTIN B.—I think that the pretence as laid means a pretence to the firm, and was correctly proved.

REGINA v. FREDERICK AUGUSTUS DAWSON.

The following forged document was held to be both a warrant and an order within stat. 11 *Geo.* 4 & 1 *Wm.* 4, c. 66, s. 3. "Mr. *Lowe*, *London*. Bought of *C. Dawson*, English and foreign fruit merchant and potato salesman, two bushels of apples, 9s. Nov. 9. Sir, I hope you will excuse me sending for such trifle, but I have received a lawyer's letter this morning, and unless I can make up a certain amount by one o'clock there will be an action commenced against me, and I am obliged to hunt after every shilling. Yours, &c. *F Dawson*."

At the Session of Gaol Delivery, holden for the jurisdiction of the Central Criminal Court, in *November*, 1850, *Frederick Augustus Dawson* was tried before Mr. Baron MARTIN, upon an indictment founded on the stat. 11 *Geo.* 4 & 1 *Wm.* 4, c. 66, s. 3, charging him with forging and uttering the document hereinafter set forth, (and which was described in some counts as an order, and in others as a warrant for the payment of nine shillings) with intent to defraud *John Lowe*. The forged document was in the following form :—

London.

Mr. *Lowe*,

Bought of *C. Dawson*, English and foreign fruit merchant and potato salesman.

Nov. 9th. 2 bushells of apples . . 9s.

*Sir,

I hope you will excuse me sending for such [*76
trifle, but I have received a lawyer's letter this morning, and unless I can make up a certain amount by one o'clock there will be an action commenced against me, and I am obliged to hunt after every shilling.

Yours, &c.

F. DAWSON.

It appeared upon the trial, that Mr. *John Lowe*, to whom the document was directed, was indebted to Mrs.

Frances Dawson, by whom it purported to be signed, and who carried on business in the name of *C. Dawson*, in the sum of nine shillings for two bushels of apples—that the document was forged and uttered by the prisoner to *Mr. Lowe* as a genuine instrument coming from *Mrs. Dawson*, with the intention of fraudulently obtaining from *Mr. Lowe* the said sum of nine shillings.

The facts necessary to establish the case were clear, but it was objected on the part of the defendant that the document was neither an order or a warrant within the meaning of the above section of the said statute.

The learned Judge directed the jury to consider whether the prisoner was guilty of forging and uttering the document with the fraudulent intention of obtaining from *Mr. Lowe* the sum of nine shillings, and appropriating it to himself.

The jury thereupon found the prisoner Guilty.

But doubting whether such document was an order or a warrant within the above section the learned Judge respited judgment, and remanded the prisoner to the gaol of *Newgate*, in order to take the opinion of this Court *77] on the question whether, under the *circumstances the above document was such an order or warrant.

On *Saturday*, 18th *January*, A. D. 1851, this case was argued before JERVIS C. J., PATTESON J., CRESSWELL J., ERLE J., and MARTIN B.

Ribton for the prisoner.

The instrument is neither a warrant nor an order, but a mere request. The cases shew that an order is a requisition by a party who has a right to command to a party who is bound to obey, as a cheque upon a banker with whom the drawer has an account.

CRESSWELL J.—The doctrine that a cheque is not an

order unless there are funds in the hands of the drawee, has been long overruled. (a)

PATTERSON J.—If this had been a genuine instrument, would it not have authorized Mr. *Lowe* to pay the money?

ERLE J.—Suppose an action for goods sold and delivered brought against Mr. *Lowe* by Mr. *Dawson*, plea payment; evidence that the payment had been made on the production of a genuine instrument in the tenor of the instrument set out in the indictment: would not the plea be proved?

Ribton referred to *R. v. Vivian*, 1 Den. C. C. 35; *S. C.*, 1 C. & K. 721; the expressions of ALDERSON B. in *R. v. Illidge*, 1 Den. C. C. 404, (b) and *R. v. Thorn*, 2 Moo. C. C. 212.

No Counsel appeared on behalf of the Crown.

*JERVIS C. J. I think if this had been a genuine document, and payment had been made on its production, proof of those facts would have been a good defence to an action. The document must therefore be held to be a warrant. I am strongly inclined to think that it is also an order. [*78]

CRESSWELL J.—I should be sorry to raise a doubt as to its being both a warrant and an order.

The rest of the Court concurred.

Conviction affirmed.

(a) See *R. v. Jackson*, 3 Campb. 370; *R. v. Locket*, 1 Leach, C. C. 53; *S. C.*, 2 East, Pl. c. 19, s. 38; *Clinch's case*, Ibid. s. 37; *Carter's case*, 1 Den. C. C. 67, per PARKE B.; *R. v. Vivian*, 1 C. & K. 721; per COLERIDGE J., as to a warrant.

(b) The judgment in that case shews that some of those expressions need qualification.

REGINA v. PATRICK WELCH.

The indictment charged *A.* with having "uttered and put off" false coin.

Held proved, although the coin was refused by the party to whom it was offered.

THE prisoner was convicted at the Quarter Sessions of the Peace for the North Riding of *Yorkshire*, on the 31st of *December*, 1850, and the following case was stated for the consideration of the Judges.

The indictment charged the prisoner with having "uttered and put off," but not with having "tendered" to one *Benjamin Dunning*, a counterfeit shilling.

The evidence proved that the prisoner went into the shop of *Dunning*, and asked to purchase some coffee and sugar, and in payment of the same he put down on *Dunning's* shop counter the counterfeit shilling in question, when *Dunning* took it up and said to the prisoner that the shilling was a bad one. The prisoner then left *Dunning's* shop, leaving the shilling; but without the coffee and sugar. The prisoner was found guilty and sentenced to be imprisoned and kept to hard labour for two *79] *calendar months; but execution of the sentence of hard labour was respited for one month. The prisoner remained in gaol for want of bail.

The question for this Court was whether the charge of having "uttered and put off" was proved by the above evidence?

This case was considered on 18th *January*, A. D. 1851, by JERVIS C. J., PATTESON J., CRESSWELL J., ERLE J., and MARTIN B.

JERVIS C. J.—The objection seems to be that the coin was offered, but not accepted; and therefore a question is raised whether the terms "uttered and put off" are satisfied by the evidence. We are of opinion that they

are. It has often been decided that an uttering may be proved without any evidence even of a tender.

CRESSWELL J. referred to *R. v. Radford*, 1 Den. C. C. 59.

[The staking counterfeit coin at a gaming table as good money, is an attempt to utter or pass the same; and losing it at play is a passing of the same against law. *The State v. Buler*, 1 Brevard, 482.]

REGINA v. MARY ANN MEARS AND AMELIA CHALK.

A conspiracy by false pretences to procure an infant female to have illicit carnal connection with a man, is an indictable misdemeanor at common law.^(a)

THE prisoners, *Mary Ann Mears* and *Amelia Chalk*, were tried at the Epiphany Sessions for the town and county of the town of *Southampton*, held on the 7th of *January*, A. D. 1851, before *Edward Smirke*, Esq., Recorder, upon the following indictment, to which they pleaded "not guilty."

*<i>Borough, Town, and County</i> <i>of the Town of Southampton</i>, to wit.	}	The jurors for our lady the Queen, upon their oath and affirm-	[*80
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ation, present that *Mary Ann Mears*, late of the parish of *St. Mary*, in the town and county of the town aforesaid, single woman, being a person of wicked and depraved mind and disposition, and contriving and craftily and deceitfully intending to debauch and corrupt the morals of one *Johanna Carroll*, as hereinafter mentioned, and to seduce her into an infamous and wicked course of life, heretofore and after the passing of a certain act of Parliament for the better preventing the heinous offence of procuring the defiling of women, to wit, on the

(a) *Semble*.—The above note is equally law, if the words "by false pretences" are omitted.

fourteenth day of *November*, in the year of our Lord one thousand eight hundred and fifty, with force and arms at the parish aforesaid, in the town and county aforesaid, did knowingly, deceitfully, and unlawfully attempt and endeavour, as much as in her lay, to procure the said *Johanna Carroll*, the said *Johanna Carroll* being then and there a child under the age of twenty-one years, to wit, of the age of fifteen years, an orphan and a servant out of place, to have illicit, carnal connection with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, by then and there knowingly and unlawfully, falsely and fraudulently pretending and representing to the said *Johanna Carroll* that she the said *Mary Ann Mears* was the friend of the said *Johanna Carroll*, and knew her father and mother, and that if she the said *Johanna Carroll* would go home with her the said *Mary Ann Mears*, she the said *Mary Ann Mears* would keep her until she the said *Johanna Carroll* could get a place, and that she the said *Mary Ann Mears* would herself try all she could to get her a place, and by then and there under such false and fraudulent pretences and representations taking her the said *Johanna Carroll* to the

*81] *house of the said *Mary Ann Mears*, and keeping her there for a long space of time, and soliciting her and trying to induce her then and there to have illicit carnal connection with the said man; whereas, in truth and in fact, the said *Mary Ann Mears*, was not the friend of the said *Johanna Carroll*, and the said *Mary Ann Mears* did not intend to take and did not take the said *Johanna Carroll* home with her to keep the said *Johanna Carroll* till she the said *Johanna Carroll* could get a place, or till she the said *Mary Ann Mears* could obtain a place for her; but craftily and subtly with the wicked design and purpose by the said false and fraudulent pretences, representations, and means aforesaid, to procure the said

Johanna Carroll to have connection with a man as aforesaid, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity.

And the jurors aforesaid, upon their oath and affirmation aforesaid, do further present that *Amelia Chalk*, late of the parish aforesaid, in the town and county aforesaid, labourer, at the time of the committing of the said misdemeanor by the said *Mary Ann Mears* as aforesaid, to wit, on the day and year aforesaid, at the parish aforesaid, and in the town and county aforesaid, the said *Mary Ann Mears* to do and commit the said misdemeanor wickedly, knowingly, and unlawfully did aid, abet, and assist, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity

And the jurors aforesaid, upon their oath and affirmation aforesaid, do further present that the said *Mary Ann Mears* and *Amelia Chalk* afterwards, to wit, on the day and year last aforesaid, with force and arms at the parish aforesaid, in the town and county *aforesaid, wickedly, designedly, and unlawfully did attempt and endeavour by false pretences, false representations, and other fraudulent means to procure the said *Johanna Carroll*, then being a child under the age of twenty-one years to wit, of the age of fifteen years, to have illicit carnal connection with a man; to wit, a certain man whose name is to the jurors aforesaid unknown, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity. [*82

And the jurors aforesaid, upon their oath and affirmation aforesaid do further present that the said *Mary Ann Mears* and the said *Amelia Chalk* afterwards; to wit, on the day and year aforesaid, with force and arms, at the parish aforesaid, in the town and county aforesaid, did

between themselves conspire, combine, confederate and agree together wickedly, knowingly, and designedly to procure, by false pretences, false representations, and other fraudulent means the said *Johanna Carroll*, then being a poor child under the age of twenty-one years, to wit, of the age of fifteen years, to have illicit carnal connection with a man, to wit, a certain man whose name is to the jurors aforesaid unknown, contrary to the form of the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity.

The following was the case proved in evidence in support of the indictment, so far as is material to the questions reserved.

The prosecutrix, *Johanna Carroll*, a girl aged fifteen, whose father and mother had been dead for two years and upwards, had been put out to service by the Guardians of the Poor within the town and county of the town of *Southampton*. On *Monday* the 18th of *November*

*83] last she left her last place, and not having got another she applied to the landlord of a public-house at *Southampton* for a bed for that night. The landlord was unknown to her when she applied; the prisoner *Chalk* was present, and the prisoner *Mears* joined them shortly afterwards. The landlord said he could not give her a bed that night, but referred her to Mrs. *Mears*, who said she would let her have a bed sooner than let her sleep out. The prisoners were at this time living in the same house in the said town, and had no apparent means of subsistence except by prostitution and receiving men in the house.

The two prisoners then took the prosecutrix home. In the course of conversation on the way, and just after they got home, *Mears* having learnt from the prosecutrix who she was, and that she wanted to get into service again, told her that she knew her father and mother, and

that she would let the prosecutrix remain in the house without paying anything till she could get a place, and that she (*Mears*) would also try to get one for her.

The prosecutrix remained some days looking for a place, and doing household work in the daytime, and sleeping with a little girl at night. *Mears* gave her food while there. On *Tuesday* evening the prisoner brought two men to the house, who stayed some time there, and drank with them. On *Wednesday* the two men again came to the house, and slept there, each with one of the prisoners.

On *Thursday* morning the prisoner *Chalk* talked to the prosecutrix, and advised her to go out and get money by "going along with men, as she herself did;" but the prosecutrix did not follow her advice. On that day three men came in the afternoon to the house, and after staying a short time went away. One of them returned later in the evening, whilst he and *the prosecutrix and both prisoners were together in a room [*84 of the house, the man (who was unknown to the prosecutrix) called *Mears* out for a few minutes; in their absence the prisoner *Chalk* told the prosecutrix that "they had perhaps gone out to talk about her (the prosecutrix), and to ask the man whether she and the man would go into the bed-room together." On the return of *Mears* and the man, *Mears* called her aside, and asked her whether she had any objection to go into the bed-room with the man. The prosecutrix refused; on which *Mears* said to her that it was the best way of getting a living. *Chalk* also urged her to go with the man, and *Mears* told her she would get some money from him if she did so. The prosecutrix persisted in refusing, and the man, after drinking with the women, left the house late at night. *Mears* then abused the prosecutrix; charged her with being sly; called her offensive names,

and said, that if she wanted to get her living she must get it as she did, if she bided with her, and she threatened to turn her out without her clothes; the prosecutrix said she would go then, but *Mears* said she should stay till next morning.

On *Friday*, a child of the prisoner *Chalk*, who was lying dead in the house, was buried. Early on *Saturday* morning the prosecutrix left the house without being allowed to take back her clothes, and having no friends or relations to go to, returned to the work-house. The prisoners, or one of them, had pawned part of her clothes, and *Mears* claimed to keep the rest to pay for the prosecutrix's lodging, but eventually delivered them up to the inspector of police, who had been sent to demand them. The prosecutrix had no knowledge of the course of life followed by the prisoners till the third day, but she owned that she suspected it on the second.

*85] *There was no proof that the prisoners, or either of them, ever knew the parents of the prosecutrix, or that they, or either of them, ever tried to get any place as a servant for her.

Several witnesses to prove the girl *Carroll's* previous habits and good character, and other circumstances, were called for the prosecution.

The prisoners offered no evidence, and made no statement in defence, nor were they defended by Counsel.

The above facts were left to the jury as evidence under all the counts, and the jury were told that they could not find *both* prisoners guilty under the first or second counts, nor *either* of them guilty under the last, unless they believed that they acted in concert, and with the common object of procuring the illicit connection alleged in the indictment by the false pretences and representations or the fraudulent means charged.

The jury found both guilty on all the counts. The

Recorder passed sentence of imprisonment of twelve calendar months on each, but respited execution, and reserved the following questions for the decision of this Court. The prisoners were committed to prison for want of bail.

First. Whether the above-stated facts were evidence to go to the jury on all or any of the counts?

Second. Whether the counts or any of them disclose an indictable offence and are valid in point of law?

On *Saturday*, 18th *January*, 1851, this case was argued before JERVIS C. J., PATTESON J., CRESSWELL J., ERLE J., and MARTIN B.

Sanders, for the Crown, (with him *Cooke*) said that the indictment was framed under stat. 12 & 13 [*86 **Vict.* c. 76, the provisions of which were intended to be as comprehensive as possible: that under this statute it would be sufficient to prove falsity of purpose, not falsity of fact, as in an ordinary case of false pretences; the words of the statute were "false pretences, false representations, or other fraudulent means." The two first counts of the indictment were good under the statute, and were proved; the third was for a conspiracy at common law, as was also proved.

JERVIS C. J.—The only question for this Court is, whether any one count in this indictment discloses an indictable offence? As to the first and second counts it is unnecessary to give any opinion, since we all think that the third count sufficiently charges an indictable offence at common law; and there was evidence upon which the jury were entitled to find a verdict of guilty. (The Chief Justice mentioned *R. v. Delaval*, 3 Burr. 1435.)

[A conspiracy to seduce and carry off a female is indictable though the seduction and abduction be not indictable. *Anderson v. The Commonwealth*, 5 Randolph, 637; *Respublica v. Herice*, 2 Yeates, 114. A confederacy to assist a female

infant to escape from the father's control, with a view to marry her against his will, is indictable as a conspiracy at common law. *Mifflin v. The Commonwealth*, 5 Watts & Sergeant, 461.]

REGINA v. WILLIAM DOVEY AND ELIZABETH GRAY.

Two persons charged in an indictment with a joint felony, ought not to be sentenced thereon on proof of two distinct felonies. If a verdict of guilty be given against both, judgment may be given against the party who is proved to have committed the first felony in order of time.

At the Epiphany Quarter Sessions for the County of *Hants*, holden at *Winchester*, on the 30th of *December*, 1850, *William Dovey* and *Elizabeth Gray*, were charged, in the first count of the indictment, with stealing; and, in the second count, with receiving twelve turkies, knowing them to have been stolen.

**Dovey* and a man named *Hodder*, who had
*87] absconded, both resided at *Brook*, in the county of *Hants*, near the premises of the prosecutor, from which the property was stolen; they were both in company with others at a public-house at eleven o'clock in the night on which the turkies were stolen, and at eight o'clock the following morning they were seen together ten miles from *Brook*, on the road from that place to *Salisbury*, with a horse and cart belonging to *Dovey*. The same day *Dovey* sold two of the turkies at *Salisbury*; and the other prisoner, *Elizabeth Gray*, who resided at *Salisbury*, was proved to have disposed of the remaining ten at *Salisbury* on the same day.

The prisoner *Dovey* made a statement, which was given in evidence, that he was called up at two o'clock A. M., in the night on which the turkies were stolen by *Hodder*, who brought the turkies to him in a sack, and

that he took them to *Salisbury*, and sold them for *Hodder*.

The jury returned a verdict of Guilty against both prisoners on the second count for receiving.

It was objected by Counsel for *Elizabeth Gray*, citing *R. v. Messingham*, 1 Moo. C. C. 257, that the prisoners could not be convicted, inasmuch as the indictment charged a joint receiving, whereas the evidence shewed separate acts of receiving. The jury were thereupon asked whether they found a joint or separate receiving, upon which they returned the following verdict:—

“We find that *William Dovey* received on the road between *Brook* and *Salisbury*, and *Elizabeth Gray* at *Salisbury*. The prisoners were not together at the time.”

Sentence of imprisonment was passed on both prisoners, and execution respited. *Elizabeth Gray* was *admitted to bail, and *William Dovey* was [*88 remanded to prison.

The question for this Court was whether upon this verdict the judgment ought to be reversed in favour of both or either of the prisoners?

On *Saturday*, 18th *January*, 1851, this case was argued before JERVIS C. J., PATTESON J., CRESSWELL J., ERLE J., and MARTIN B.

Saunders for the prisoner *Gray*(a) was stopped by JERVIS C. J., who said that the Court were of opinion that the first receiver, *Dovey*, was properly convicted: and as *R. v. Messingham*, 1 Moo. C. C. 257, shews that several persons cannot be convicted of distinct felonies which are charged in an indictment as a joint felony, the evidence ought to have been confined to the case of the

(a) *Saunders* stated that the male prisoner had hanged himself since his conviction.

first receiver, and a verdict of acquittal taken in favour of *Gray*.

THE QUEEN *v.* GEORGE REID, WILLIAM ACKROYD
and WILLIAM ROTHWELL.

A. was indicted for feloniously assaulting *B.*, putting him in fear and danger of his life, feloniously and violently stealing from his person, and before, at and after such robbery feloniously beating him against the form of the statute, and against the peace. Verdict, guilty of assaulting and beating, with intent to rob.

Held, that the above finding would not warrant a conviction of assault either at common law or under the stat. 7 & 8 Wm. 4 and 1 Vict. c. 85, s. 11, and that the judgment must be arrested.

At the *York* Winter assizes, A. D., 1850, the prisoners were tried before Mr. Baron MARTIN, on the following indictment.

*89] **Yorkshire*, (to wit). The jurors for our lady the Queen upon their oath present that *George Reid*, late of the parish of *Doncaster*, in the county of *York*, labourer, *William Ackroyd*, late of the same parish labourer, and *William Rothwell*, late of the same parish, labourer, on the eighteenth day of *September*, in the year of our Lord, one thousand eight hundred and fifty, with force and arms at the parish aforesaid, in the county aforesaid, in and upon *George Smith* in the peace of God, and our said lady the Queen, then and there being, feloniously did make an assault, and him the said *George Smith*, in bodily fear and danger of his life then and there feloniously did put, and two pieces of the current silver coin of the realm called shillings, two pieces of the current coin of the realm called sixpences, and one silk handkerchief of the value of two shillings of the moneys, goods, and chattels of the said *George Smith*, from the person and against the will of the said *George Smith*, then and there feloni-

ously and violently did rob,^(a) steal, take, and carry away. And that the said *George Reid*, *William Ackroyd* and *William Rothwell* immediately before, at the time of, and also immediately after such robbery as aforesaid, did then and there feloniously beat and strike, and use other personal violence to the said *George Smith* against the form of the statute in such case made and provided, and against the peace of our lady the Queen, her Crown and dignity.

The jury found that the prisoners were guilty of assaulting and beating *George Smith* (the person named in the indictment) with intent to rob him.

It was objected by the Counsel for the prisoners, that *upon this finding the prisoners were entitled to have a verdict of not guilty entered for them. [*90

The learned Baron thought not, and that it was lawful to proceed to judgment against the prisoners; but at the request of their Counsel, and with the concurrence of the Counsel for the prosecution, he respited the judgment until the next assizes, in order that the question might be submitted to this Court.

On the 18th *January*, A. D. 1851, this case stood for argument before JERVIS C. J., PATTESON J., CRESSWELL J., ERLE J., and MARTIN B.

Overend appeared for the prisoners, *Reid* and *Rothwell*. *Dearsley* for *Ackroyd*. This case was adjourned to the 8th *February*, by order of the Court, in order that Counsel might be heard on behalf of the Crown. And on that day it was argued before JERVIS C. J., ALDERSON B., V. WILLIAMS J., PLATT B., and MARTIN B.

Overend (with him *Dearsley*).—*First*. The indictment does not include an assault with intent to rob. The

(a) In the course of the argument V. WILLIAMS J. remarked that the word *rob* was here insensible and superfluous.

offence charged is robbing, *i. e.* larceny with aggravation; robbery does not necessarily include an assault; there may be a robbery by putting in fear. The foundation of the charge of robbery is larceny; whereas the foundation of a charge of assault with intent, is an assault.

ALDERSON B.—Is there any instance of a person being found guilty of one felony on a charge of another felony, unless such felony is charged in the indictment, expressly or by necessary implication? At common law a felony was partible, and therefore if the charge necessarily included two felonies, there might be a conviction of the lesser, and an acquittal of the greater, but not otherwise.

*91] *Overend.* The jury here only find the prisoners guilty of the matter of aggravation, they acquit of the thing itself of which the aggravation is an incident, *viz.*, the robbery. Therefore the verdict finds a crime to have been committed, which was not charged, *viz.*, an assault with intent to rob. 2 East, P. C. 514, 515. *R. v. Watkins*, C. & M. 264.

Secondly. The finding of the jury is not warranted by the stat. 7 Wm. 4 & 1 Vict. c. 85, s. 11. That statute was passed in order to obviate the necessity of two indictments, where the offence charged involved a felony as well as misdemeanor. It could not have been meant to provide for a case in which several distinct felonies are charged, for that case needed no such provision; since any number of felonies which were involved in one act could have been all charged in the same count at common law. The statute would therefore have been inoperative, except in the view above suggested. The jury have acquitted the prisoners of all the felonious acts charged in the indictment, and have found them guilty of another felony; which they had no power to do. (*Vandercomb's case*, 2 East, P. C. 519.) The stat. 7 Wm. 4 & 1 Vict. c. 85, was not in-

tended to alter the forms of criminal pleading, but merely to enable the jury to convict of that portion of an offence which was charged in an indictment for a particular class of felonies, but which, owing to its being a misdemeanor, was not punishable on that indictment. The words in the finding "with intent to rob him," cannot be rejected as surplage, because they are sensible and material where they stand, and give the assault the character of a felony, instead of that of a misdemeanor.

Hall for the Crown, contended that the stat. 7 Wm. 4 and 1 Vict. c. 85, s. 11, applied to any felony, and authorized an acquittal of the particular felony charged, *and a conviction of assault; that it left it quite [*92 uncertain what sort of assault was meant; that assaults are of two kinds; some felonious, some mere misdemeanors, and that the statute seemed to include both. But if not, he contended that the verdict was a good finding of a felony at common law; that any number of felonies might be charged in the same count; that a felonious assault was charged in the indictment; that an assault with intent to rob was the only instance of a mere assault with intent, which amounted to felony; that *Vandercomb's case* was different, because there the intent might relate to any sort of felony, but here it is confined to one class, viz., an intent to rob; that if the verdict were held to be bad, it would be error on the record, and a *venire de novo* must be awarded.

ALDERSON B.—We cannot award a *venire de novo*; no judgment has been given. The proper course would be to arrest the judgment.

Overend referred to *Campbell v. The Queen*, 2 Cox, C. C. 463; *R. v. Huxley*, C. & M. 596; *R. v. Walker*, 2 M. & R. 446.

JERVIS C. J.—I am of opinion that the finding of the jury does not warrant a conviction, and that the judg-

ment must be arrested. There are two ways in which the case is presented to the Court. It is *first* said that the finding of the jury was one of a felony that was technically included in the indictment, and therefore, without reference to the statute, the prisoners might be convicted at common law. I think that not the correct view of the case. In order to convict of a felony which was not the felony primarily charged, it is necessary that the minor felony should be substantially stated in the indictment. There is the case of an indictment for burglary, which comprehends in its statement an indictment for housebreaking, and generally for larceny in the *93] house; it has been *contended that the party might be convicted of intending to steal; but it was decided in *Vandercomb's case*, that in an indictment for burglary and stealing you could not find the party guilty of intending to steal. If that be the true criterion you must look at the indictment and strike out that portion of it which the jury have negatived. The jury here have struck out that he did violently seize and carry away the goods, and have thereby left the assault only, and not an assault with intent to rob. It is said, in addition, that "robbery" is a word of art which includes the intent; I do not think that can be maintained. The mere insertion of the words *rob* or *robbery* in the indictment, cannot be taken to have that effect. The conviction cannot therefore be sustained at common law, because the jury have found the prisoners guilty of a felony which is not charged in the indictment. *Secondly*, it is said that the late statute enabled the jury to find a verdict of an assault with intent to rob. But the only assault which that statute refers to, is an assault, with the legal incidents of an assault, viz., the legal character of a misdemeanor; but that is not the assault here found. The consequence is, that when the record is made up, it

would show an indictment for a robbery, which included a stealing and an assault, and a verdict of guilty of a felony which was not charged : such a finding would not be warranted, and would be equivalent to no finding at all. The conviction therefore is bad. The certificate however will not be issued for a few days, and in the meantime the Justices can take the requisite steps to bring the prisoners to trial on the charge of assaulting with intent to rob.

The rest of the Court concurred.

*THE QUEEN v. ROBERT COURTICE BIRD AND SARAH BIRD. [*94

B. and wife indicted for having on 10th Nov. 1849, assaulted *A.* with intent to wound, and with intent by such wounding to do her grievous bodily harm.

Plea, *autrefois acquit*, setting out an indictment for murder, containing six counts ; the third count alleging beatings on the 5th Nov., 1st Dec., and 1st Jan., and on divers other days between 5th Nov. and 1st of Jan. The plea then averred the identity of the assaults charged on this and the former trial.

Replication, that the prisoners were not acquitted of the felony and murder, including the same identical assaults charged in the present indictment.

On the trial for murder the Counsel for the Crown had opened the assaults alleged in the third count, (among others) as conducing to the death, and had given evidence of them in support of the charge of murder.

It was proved on that trial, as it also was on this, that the death which took place on the 4th of January was caused exclusively by one particular blow on the head inflicted shortly before the death of the deceased, and there being no evidence to shew that that blow had been struck by either of the prisoners, they were acquitted on the whole indictment.

It was not shewn on the present trial that there were any other assaults committed but those which had been given in evidence on the former trial.

The Judge directed the jury that if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown.

Verdict, Guilty.

Held, by eight Judges, that the conviction was right; by six Judges, that the conviction was wrong.

THE prisoners were tried before *Russell Gurney, Esq.*,

Q. C., at the *Devon* Summer assizes, on an indictment, which charged them with having on the 10th *November*, 1849, assaulted *Mary Ann Parsons* with intent to wound. and with intent by such wounding to do her grievous bodily harm.

The prisoners pleaded that they had been before acquitted of the offence charged.

The plea set out an indictment for murder, the first count of which charged a murder of *Mary Ann Parsons*. by striking on the 5th of *November*, 1849, with a stick. on the head, chest, shoulders, back, arms, legs, and thighs, causing divers mortal bruises of which she died on the 4th of *January*, 1850.

2nd count. Alleged the mortal bruises to have been caused by divers beatings between 5th *November* and 1st of *January*.

*95] *3rd count. Alleged beatings on 5th *November*, 1st *December*, and 1st *January*, and on divers other days between 5th *November* and 1st *January*.

4th count. Alleged the mortal bruises to have been caused by blows inflicted with a scourge made of leather thongs.

5th count. Alleged the mortal bruises to have been caused by casting and throwing her against the ground on the 1st of *January*, 1850.

6th count. Alleged the mortal bruises to have been caused by throwing her on the ground, and then kicking and beating her on the 1st of *January*, 1850.

It then alleged that the indictment including divers assaults against *Mary Ann Parsons*, and that the prisoners were acquitted upon the said indictment, and that the assaults included in the felony and murder charged upon them in the said indictment were the same as those charged in the present indictment. The replication to this plea averred,

That the prisoners were not acquitted of the felony and murder, including the same identical assaults charged in the present indictment.

The former record was put in, and it was proved that on the former trial evidence had been given of different assaults committed by the prisoners upon the deceased through the months of *November* and *December*. One on the 5th of *November* with a stick upon the arm and neck, one at the end of *November*, or beginning of *December* with a stick across the shoulders, another with a furze bush about the 11th of *December*, and it was also shewn that some time before the death, but the precise time was not fixed, the deceased had been flogged with a birch on the legs and thighs. (a)

*The counsel for the prosecution in opening the case to the jury on the former trial had opened these different assaults as conducing to death, but stated that if he should fail in proving that they conduced to the death, they would furnish evidence of the *animus* of the prisoners. [*96]

It being proved, however, on that trial, as it also was on this, that the death which took place on the 4th of *January*, was caused exclusively by one particular blow on the head inflicted shortly before the death of the deceased, and there being no evidence to shew that that blow had been struck by either of the prisoners, they were acquitted.

It was not shewn at the present trial that there were any other assaults committed but those which had been given in evidence on the former trial.

Under these circumstances, the following question of law arose, whether the general acquittal pronounced at

(a) Struck out by consent at the hearing before this Court. (*Vide* remarks on this, on the second argument, *post*.)

the former trial could operate as a bar to a prosecution for each and every of the assaults so given in evidence.

After telling the jury that the burden of proof lay upon the prisoners who were bound to establish the truth of their plea, the learned Commissioner directed them, that *if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown.*

The jury thereupon found a verdict for the Crown. But a doubt existing in the mind of the learned Commissioner as to the correctness of his direction to the jury, he stated the above case for the opinion of this Court. The prisoners were not sentenced but remained in custody.

*97] On Wednesday, 20th November, 1850, this *case was argued before POLLOCK C. B., WIGHTMAN J., V. WILLIAMS J., TALFOURD J., and MARTIN B.

Slade appeared as Counsel for *R. C. Bird*.

Cox for *S. Bird*.

Cockburn Q. C. (Solicitor General), with him *Rowe* Q. C., and *Karslake* for the Crown.

Slade. The prisoners when tried upon the second indictment had already been in peril for the offence therein charged on a previous indictment, and were therefore entitled to an acquittal. The plea of *autrefois acquit* raised the issue of the identity of the two charges, and on proof of such identity the prisoners were entitled to an acquittal. If by any evidence whatever the prisoners could have been legally convicted on the first indictment, whether such evidence were offered by the Crown or no, then the plea of *autrefois acquit* entitled them to a verdict of not guilty. It was material on the second trial to shew that the assaults there charged were part of the

very act or transaction for which the Crown prosecuted on the first trial. They were so. The Counsel for the Crown relied on the proof of those very assaults as part of the proof of the felony and murder; and when the medical evidence shewed clearly that the death was not attributable to any of the assaults there charged, there was a general verdict of acquittal. On the first trial the question whether the prisoners could be convicted of an assault underwent no discussion. The point was suggested; but the learned Judge decided on the authority of *Reg. v. Crumpton*, C. & M. 597, that they could not, and they were therefore acquitted on all the counts.

On the second trial, the identity of the assaults being clearly proved, it was submitted to the learned Commissioner that the issue raised by the replication was proved in favour of the prisoners, and that they *were [*98 therefore entitled to an acquittal. But instead of putting to the jury the facts which went to make up the issue which was so raised, the learned Commissioner adopted the words used by PATTESON J. in *R. v. Crumpton*, C. & M. 597, and told the jury that if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict of guilty. There are, therefore, two questions for this Court. 1. Whether upon proof of the identity of the assaults charged in the two indictments the prisoners were not entitled to any acquittal. 2. Whether the questions left to the jury by the learned Commissioner were not a misdirection.

The two questions may be considered together: it will be convenient to consider the cases which have been decided on stat. 7 Wm. 4 & 1 Vict. c. 85, s. 11, in chronological order. The statute provides "That on the trial of any person for any of the offences hereinbefore men-

tioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding; and when such verdict shall be found the Court shall have power to imprison the person so found guilty of an assault for any term not exceeding three years." Suppose, therefore, that a prisoner indicted for a felony could be legally convicted of an assault on any evidence which might conceivably be offered, he would, when tried for such a felony, be in peril of being convicted for an assault, and would therefore be entitled to plead such record in bar of a second indictment for such assault.

*99] The cases shew that Mr. *Greaves* (in his note (f) to 1 **Russell on Crimes*, 782,) has put too narrow a construction on the statute 7 *Wm.* 4 & 1 *Vict.* c. 85, s. 11. In *R. v. Ellis*, 8 C. & P. 654, A. D. 1838, the charge of felony was negatived, and therefore the assault of which the prisoner was convicted could not have been committed in the endeavour to commit a felony. Yet PARKE J. and ALDERSON B. held the conviction good.

V. WILLIAMS J.—That case would be in point if there had been a robbery, but no conviction of the robbery: for here there has been a death.

Slade. It seems that there was a robbery in fact, in that case. In *R. v. Gould*, 9 C. & P. 364, A. D. 1840 *A.* was indicted for burglary. He had been previously tried for the murder of *B.*, at the time when the alleged burglary was committed, and in furtherance and prosecution of its commission. PARKE B. in summing up the case, told the jury that the charge in the indictment did not affect the life of the prisoner, as there was not an allegation that the burglary was accompanied by violence,

and that if he had been indicted for burglary, with violence, as he might have been convicted of manslaughter or even of assault on the indictment for murder, on which he had been acquitted altogether, in his opinion that acquittal would have been an answer to the allegation of violence if it had been inserted in the present indictment. In *R. v. Gutteridge*, 9 C. & P. 471, A. D. 1840, PARKE B. said, "I quite agree with the learned Counsel, that on an indictment for felony, you ought not, under the late statute, to convict of a completely independent and distinct assault; but only of such an assault as is connected with the felony charged." In *R. v. Poul*, 9 C. & P. 728, A. D. 1841, no evidence of the manslaughter was offered, but GURNEY B. said, "Taking that to be so, we should have evidence as to *the blows, because [*100 on this inquisition the prisoner may be convicted of an assault under stat. 7 Wm. 4 & 1 Vict. c. 85, s. 11.

In *R. v. McPhane and Others*, C. & M. 212, A. D. 1841, A. B. & C. were jointly indicted for a felonious assault; C. was proved not to have come up till after the felonious acts had been committed by the others, and they had left the spot, and therefore as the assault committed by C. was totally disconnected from the felony, TINDAL C. J. held that C. must be acquitted. And with regard to A. & B. he directed the jury that if they were not satisfied that they had the intent either of wounding with intent to maim, or with intent to do grievous bodily harm, but still were of opinion that they struck the prisoner in the way described by the evidence, they were at liberty to convict them of a common assault only. Therefore, in the opinion of TINDAL C. J. the assaults need not be such as conduced to the felony charged, so long as they were a part of the transaction which was charged as a felony in the indictment. It is not contended that a person can be convicted of an assault which was wholly disconnected from the transaction charged, as a felony. In *R. v. Phelps*,

C. & M. 180; *S. C.* 1 Greaves's Russell, 781; 2 Moo. C. C. 240, A. D. 1841, the fifteen Judges held that the assault must be a fact comprised among those which if proved would amount to the greater charge of felony, not a distinct and separate assault such as was there proved. But they did not hold that the assault must be so connected with such greater charge as to "*conduce to the felony*." The whole difficulty arises from the expressions reported to be used by PATTESON J. in *R. v. Crumpton*, C. & M. 600, A. D. 1842. "I think no assault is included in a charge of manslaughter which does not *conduce to the death* of the deceased, although the death itself be *not manslaughter. Here the surgeon discon-
 *101] nects this assault from the death, and I think therefore that the prisoner is entitled to be acquitted altogether." This seems to be much too narrow a construction of the act, and one which has not received the sanction of the other Judges. It would seem to involve the doctrine that where there was no conviction for the felony, there could be no conviction for the assault, which is certainly not law. In *R. v. Archer*, 2 Moo. C. C. 283, A. D. 1843, PATTESON J. held that where a felonious assault has been committed by divers, one of the parties charged may be acquitted of the felony and convicted of the assault, while the others may be convicted of the felony; and the fifteen Judges affirmed the decision. In *R. v. Boden*, 1 C. & K. 399, A. D. 1844, PARKE B. is reported to have said, "There appear to be two constructions of the statute, either of which will authorize a conviction for the assault in this case. The first is, that the statute warrants a conviction for an assault, in every case where the felony charged includes an assault. It may have been the intention of the Legislature to do away with the distinction that formerly prevailed, that on an indictment for felony the prisoner could not be

convicted of a misdemeanor included in such felony, although, in the case of complicated felonies, as murder and burglary, he might be convicted of a lesser felony included in such charges. One ground of the former distinction was, that in felony the prisoner was not entitled to make his full defence by Counsel; and therefore if he was convicted of a misdemeanor, on an indictment for felony, he would have been deprived of the benefit of his Counsel's address to the jury. But since the Prisoners' Counsel Act this distinction is done away with; and it may therefore have been the intention of the Legislature to permit a conviction for an assault *in the case of any felony including an assault. The [*102 second construction is, that the statute authorizes a conviction of that assault which is offered in evidence on the part of the prosecution in support of the felony charged. Therefore, *quæcunque viâ*, the prisoner in this case may be convicted of an assault. Another view of the statute has been suggested in a very learned note to a recent edition of Mr. Serjeant Russell's work on the Criminal Law; but it seems to me that the view of the statute would exclude a large number of cases, such as cutting with intent to do grievous bodily harm; and there are so many instances in which it has been held that the statute applies to such cases, that I think it cannot be so limited. I shall therefore sentence the prisoner, and not reserve the point."

TALFOURD J.—Is it contended that under this statute a prisoner charged with a felony involving an assault may be convicted of several assaults, as when charged with a misdemeanor? In the latter case, there may be several counts charging several assaults, and upon each count there may be a separate sentence and punishment. Can several distinct beatings in distinct weeks be treated as one assault, under this statute?

Slade. In *R. v. Lewis*, 1 C. & K. 421, A. D. 1844, COLERIDGE J. said, "Whenever a charge of felony includes an assault, and the jury think the felony is not made out, the party may be convicted of an assault." There the prisoner was indicted for manslaughter. In *R. v. Birch*, 1 Den. C. C. 185, A. D. 1846, all the authorities were reviewed by the fifteen Judges, and PARKE B. gave a written statement to the reporter of the grounds of that decision, and laid down a rule which, as applied to this case, shews beyond question that the direction here given to the jury was wrong. "The Judges thought, upon *103] *consulting all the authorities, that this enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. But they were of opinion, that in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment."

POLLOCK C. B.—The expressions there used are ambiguous, and open to several interpretations.

Slade. That decision has been often acted upon since, and invariably recognised as good law. *R. v. King*, 2 Cox C. C. 95, A. D. 1846; *R. v. Auty*, *ibid.* 282, A. D. 1847. Those cases are stronger than the present one, because there the death charged as a manslaughter was proved to have resulted from natural causes. It is true that in *R. v. Connor*, 2 C. & K. 518, A. D. 1847, *Murphy* Serjeant, after consulting with POLLOCK C. B., held that on proof of a similar state of facts the prisoner could not be convicted of an assault. But in *R. v. Barnett*, 2 C. & K. 59 S. C. 3 Cox C. C. 432, A. D. 1848, CRESSWELL J. held

where three men were indicted for an assault and robbery, if the jury were not satisfied that any of the prisoners committed any robbery, yet they might all be convicted of an assault, because the assault proved was included in the offence charged in the indictment. In *R. v. Rooke*, tried at the Central Criminal Court, August 1850, PLATT B. acted upon the decision of the judges in *R. v. Birch*. Thus all the authorities with the exception of *R. v. Crumpton*, C. & M. 597, and *R. v. Connor*, 2 C. & K. 518, shew that the position that there cannot be a conviction for an assault under *stat. 7 Wm. 4 & 1 Vict. c. 85, s. 11, unless the assault proved con- [*104
duce to the felony charged, is incorrect, and confines the operation to the statute within much too narrow limits; therefore, the direction of the learned Commissioner in this case cannot be supported. *Slade* afterwards added to the above authorities *R. v. Walker*, 2 M. & R. 446, A. D. 1843.

Cox (on the same side.) *First.* *Autrefois acquit* is pleadable in this case. It may be contended that an acquittal for a felony cannot be pleaded in bar of an indictment for a misdemeanor. That, perhaps, was so before the stat. 7 Wm. 4 & 1 Vict. c. 85, but cannot be so now; for if so, a prisoner could be convicted of an assault on a prosecution for a felony, and be afterwards liable to a second conviction for the same assault on an indictment for a misdemeanor.

Secondly. On the general principles of a plea of *autrefois acquit*, the prisoners were entitled to an acquittal.

POLLOCK C. B.—Suppose *A.* indicted for an assault on *B.*, and acquitted. After the trial *B.* dies, and *A.* is then indicted for murder; could he plead *autrefois acquit*?

Cox. In this case the only question raised by the replication, was, had the prisoners been tried before for the assaults which were charged in this indictment as a

misdemeanor: were they the same assaults in *fact*? It is said that the test whether the plea of *autrefois acquit* applies in any given case is— “would the evidence necessary to support the second indictment have been sufficient to procure a legal conviction upon the first?” Archb. Cr. Pl. 11th ed. p. 89.

Perhaps it may be more complete if stated thus— Do the two indictments contain any counts which are so far identical that the evidence necessary to support any count in the second would have been sufficient, *105] *had it happened to have been offered, to have warranted a conviction on any count in the first? *R. v. Vandercomb*, 2 Leach, C. C. 3rd ed., case 276; *R. v. Sheen*, 2 C. & P. 639. Apply that test to this case. 1st. The two indictments contained counts charging similar offences. 2nd. The evidence of assaults offered on the second is admitted to be identical with the evidence of assaults offered on the first: they were the very same identical beatings in *fact*. 3rd. The prisoners might conceivably have been convicted on the first, and certainly would legally have been convicted, had the jury chosen to have thought that a different character and incidents were to be attached to those beatings, from that which the medical witnesses attached to them, and had either attributed the death to the assaults, or thought that the assaults either *conduced to the death* (if *R. v. Crumpton*, C. & M. 597, is good law), or were *connected with the felonious transaction* (according to *R. v. Birch*, 1 Den. C. C. 185)

It is clear, therefore, that the evidence given upon the second indictment would have warranted a conviction of an assault upon the first; and had the Judge left it to the jury on the first trial to say whether or no they thought the prisoners guilty of a common assault, the jury might legally have convicted them of such

assault; and then on a second indictment they could have pleaded *autrefois convict*, just as they were entitled to plead *autrefois acquit* in the present case. For the only issue raised by the replication was, were the assaults charged on the second indictment *the same beatings, &c.*, in point of fact as the beatings, &c. charged and proved on the first indictment?

POLLOCK C. B.—You must go the length of saying that this plea and proof of the identity of the assaults would have entitled the prisoners to an acquittal, even *though there had been no evidence offered on [*106 the first indictment.

Cox. Yes. The only difficulty in that case would have been the proof of the identity. Probably the date of the assaults as laid in the first indictment would have been held *prima facie* evidence, at all events, of the assaults intended to be proved in support of it.

POLLOCK C. B.—The verdict is not guilty of the felony and murder aforesaid. The stat. 7 Wm. 4 & 1 Vict. c. 85, has made no alteration in *the form of the finding*. If it had pronounced distinctly that the issue upon the assaults is before the jury, and that they might by their verdict pronounce the prisoner not guilty of all the charges, the case would have been free from difficulty. But all that the statute provides is that the jury may find a verdict of guilty, and says nothing at all about an acquittal.

Cox. Suppose the jury on the first trial had chosen to convict the prisoners, would not that have been a legal conviction? Must not there have been a verdict of guilty entered on the record, and could that have been got rid of—except by a pardon?

POLLOCK C. B.—Yes. Suppose the Judge had said there is no evidence of an assault in this case which will warrant a conviction, and the jury had notwithstanding persisted in returning a verdict of guilty, the *Attorney*

General might bring a writ of error in fact, and confess that the judgment could not be sustained.

The Court adjourned till *Friday*, 22nd *November*, on which day

The *Solicitor General* proceeded to address the Court on the part of the Crown. He felt there was considerable conflict of opinion upon the true construction of the statute 7 *Wm.* 4 & 1 *Vict.* c. 85, and it *was necessary to start with the law as laid down by the Judges in the case of the *King v. Vandercomb*, 2 *Leach*, C. C., case 276, by Mr. Justice BULLER, who had stated that the true criterion upon the plea of *autrefois acquit* was, whether the facts charged in the second indictment would have been sufficient to support a conviction upon the first indictment. That was the principle of the true foundation of the doctrine upon which the plea should rest. Starting with the proposition that the plea of *autrefois acquit* could not be sustained unless the facts involved in the second charge would have warranted a conviction on the first, it reduced the question to this—whether these prisoners, upon the facts, could have been convicted upon the first indictment; and he thought there could not be the least doubt in the world that it was quite clear they could not have been convicted of *murder*. The facts were these:—These two persons being charged with the murder of an apprentice girl, it appeared that a series of acts of cruelty and ill-usage had been inflicted upon her by the prisoners, but it appeared that it was not these beatings and ill-usages which had occasioned the death—the surgeons negating that, and proving the death to be attributed to a particular blow inflicted a few days before the death. There was evidence to shew that the two prisoners had inflicted beatings, &c., which the surgeons disconnected with the cause of the death. There was no evidence to shew by whom

the last fatal blow had been inflicted. And he would, therefore, venture to assert, as a proposition upon the highest authority, that under these circumstances it was impossible either of these parties could have been convicted. The matter had caused considerable sensation, and he might say that the Profession were unanimous in *thinking that neither of these parties could have [*108 been convicted.

The Chief BARON was glad to hear this observation, because it was desirable that the administration of justice should be free from the reproach of having caused a failure of justice. In the case of the *Mannings* he had felt himself obliged to tell the jury, and he did tell them, that if they, upon deliberation, thought that a murder had been committed beyond a doubt, and committed by one of the prisoners, but after the utmost deliberation they thought the other was innocent, and they could not fix the guilt distinctly upon either, they would be bound to acquit both. That was clearly the law of the land.

The *Solicitor General* thought his Lordship would not think he was making an observation which was impertinent, if, after the discussion which had taken place with reference to this memorable trial, he expressed not only his own profound conviction, but the unanimous conviction of every lawyer in *Westminster Hall* that the law was so. It was admitted by his friend on the first trial; the moment the assault was suggested on the part of the prosecution it was met by the authority of the *Queen v. Crumpton*, C. & M. 597, and it was asserted that the assault was not connected with the charge of murder with which these two persons were charged; and he would submit that the learned Judge was perfectly right in principle and was supported by some very strong authorities; and it was right that the question of assault should be treated under a substantive indictment. The authori-

ties had been so much commented upon that he would only take a rapid review of them. He admitted that there was considerable conflict in the cases, and he must have recourse to principle in order that the Court might lay down *109] *some rule which might be considered as authority. The whole question turned on the effect of the statute 7 Wm. 4 & 1 Vict. c. 85. Prior to that statute a person charged with felony could not be convicted of a misdemeanor involved in that felony; but the statute had provided for such a case. It frequently happened that persons charged with felony from various causes were acquitted, the proof failing, so that there appeared to be a complete failure of justice, because it might be clear that they were guilty of grievous assaults, though such assaults might not be felonious. These cases were what the statute intended to apply to. The object of the statute was, in case of a failure to make out the charge of felony, to enable the jury to convict the party of an assault. Some cases seemed to have gone to this extent—that if a felony was charged and a misdemeanor of assault proved, although that assault should not be connected with the felony still the party might be convicted of the assault. Such had been the opinion of Baron GURNEY in the *Queen v. Pool*, 9 C. & P. 728. Still he did not think when the Court reviewed the cases they would feel bound by the opinion thrown out in that case, which certainly had been overruled. His (the *Solicitor General's*) proposition was this, that in order that a conviction might take place, the assault must be one connected with the circumstances relied upon to make out the felony—in this case with the death—in others with the robbery, or rape, &c. There must be something connected with the main felony itself, and although one learned Judge might throw out and act upon one principle, and another upon another, they would find that the

assault was connected and immediately connected with the chief transaction which was charged as the felony and inseparable from it, and that in all the cases some *other ingredient only was wanting to make out [*110 the felony. In one of the cases cited on the other side, *R. v. Ellis*, 8 C. & P. 654, the parties were charged with robbery, but the particular prisoner was not seen to have committed the robbery, but was seen to commit an assault. He was seen in the course of the transaction which led to the robbery—the robbery was part and parcel of the same transaction—connected in point of time—connected in point of immediate sequence; but there was a failure of proof of the robbery. It was said that it was competent for the jury to convict of the assault; but that was the judgment of a single Judge, and very shortly afterwards the doctrine was not upheld. In *R. v. Gould*, 9 C. & P. 364, there had been no argument. It was not because the statute made it competent to the jury to convict a man of the misdemeanor that it was necessary he should be convicted, and by that means escape the higher penalty which would attach to the minor felony involved in the matter. As to *R. v. Archer*, 2 Moo. C. C. 283, the question was, whether upon a joint indictment one party could be convicted of a felony and the other of a misdemeanor. It was held they could. That case is not much in point either way. Then in *R. v. Gutteridge*, 9 C. & P. 471, PARKE B. said, that in an indictment for felony they ought not to convict of a completely independent, and distinct assault, but only of such an assault as was connected with the felony charged. In *R. v. St. George*, 9 C. & P. 491, where the prisoner was charged with attempting to fire a pistol with intent, &c., the question was whether the prisoner could be convicted of an assault committed with his hand prior to having drawn out the pistol. Baron PARKE held that the pri-

soner could only be found guilty of that assault which was involved in and connected with firing the pistol.

*111] *Then came the case which underwent the consideration of the fifteen Judges, *R. v. Phelps*, C. & M. 180, 2 Moo. C. C. 240, 1 Greaves's Russell, 781. *Phelps and others* were indicted for murder. He had struck the deceased with his fist several times, but then went away, and was not present when the fatal blow was struck. The jury found *Phelps* guilty of the assault, but acquitted the others altogether. The point was reserved and the Judges unanimously held that the conviction was wrong because the blows were disconnected with the cause of death. How was it possible to distinguish that case from the present? Then they came to the case which had been relied upon at the trial for the murder, *R. v. Crumpton*, 1 C. & M. 597. It might have been thought that these cases would have completely settled the law; but in *R. v. Boden*, 1 C. & K. 398, PARKE B. is reported to have adopted a view of the statute in some degree opposed to those decisions. The report seems not very accurate; but be that as it may, even in that case the assault was directly involved in the felony charged: and upon conviction, PARKE B. gave so slight a punishment that the point was not reserved. It was monstrous to suppose that where a party was acquitted of a felony he might be convicted of an assault which was totally disconnected from the felony. It was not because a felony involved an assault that therefore you might convict a man of any assault whatever. In *R. v. Birch*, 1 Den. C. C. 185; S. C. 2 C. & K. 193, the prisoner was indicted for robbery; he was acquitted of the robbery and convicted of the assault, but it was clear the assault and the robbery were considered as one transaction, although the jury negatived the intent to rob. The greatest consideration was given to Mr. *Greaves's* note to Russell, who

had contended that it was necessary that the intent to commit the felony *should be made out in order to warrant the conviction for the assault. The [*112 correctness of that note was questioned, and the decision in *R. v. Birch*, must be viewed with reference to that note; and the opinion of the Judges, as there given by Baron PARKE, cannot be construed to apply to a case like the present, where the assaults were wholly disconnected with the felony. But even if it is to be so construed, it seems to be rather the opinion of Baron PARKE individually than the actual judgment of the Bench. This appears from the case of *R. v. Greenwood*, 2 C. & K. 339, in which WIGHTMAN J. who tried the case, consulted Mr. Justice CRESSWELL, and then said the prisoner could not be found guilty of the assault unless it appeared that it was committed in the progress of something which when completed would be with intent of committing a felony; therefore; unless the jury were satisfied the prisoner intended to rob at the time he assailed the prosecutor he could not be convicted. It is clear, therefore, that the above opinion of PARKE B. could not then have been present to the mind of WIGHTMAN J., and therefore may fairly be considered rather the *dictum* of a single Judge than a judgment of the whole Bench. *R. v. Conner*, 2 C. & K. 518, was directly in point. An acquittal was directed by Serjeant *Murphy*, after consulting the CHIEF BARON, because the death was not connected with the assault. The same remark may be here made respecting the judgment in *R. v. Birch*; and in *R. v. Barnett and Others*, 2 C. & K. 594.

CRESSWELL J. said, the jury ought not to convict of an assault which was unconnected with the robbery. In all the cases there was not one in which the party had been convicted of an assault which was unconnected with the principal transaction charged. In *R. v. King*, 2 Cox C.

*113] C. 95, Lord DENMAN seems to *have construed the statute somewhat differently, but even there the assault may be regarded as an actual part of the transaction.

V. WILLIAMS J. said, in the case of *R. v. Auty*, 2 Cox, C. C. 282, he had concurred with Baron PLATT, and he believed the distinction in which he concurred was this:—If the prisoner was charged with killing by violence, and the evidence for the Crown shewed that there was such a transaction, but that the prisoner was not one who was implicated, then he must be acquitted generally, although he may be guilty of an assault upon the deceased, because that assault was not part of the imputed transaction; but if the evidence for the Crown failed to shew that there was any such transaction as a death by violence, but that it was attributable to natural causes, but the evidence shewed a transaction amounting to an assault, in which the prisoner was implicated, and nothing more, then the jury might convict of the assault, because the only transaction charged, was proved, and the prisoner was shewn to have been guilty of it.

The *Solicitor General*. Death there appeared to have proceeded from natural causes, and there was nothing beyond the assault. The charge terminated with the assault and could be carried no further. But in the present case they had the fact of a death by violence occasioned by somebody else; and it involved this question, whether if *A.* was indicted for murder, and it appeared that *B.*, and not *A.*, had occasioned the death and was guilty of the murder, you could find *A.* guilty of an assault which, in truth, was quite an independent transaction.

TALFOURD J. Suppose the order of proof had been inverted, and the medical men had been first called and proved the death to have been occasioned in some other

way than what was charged in the indictment, *the Judge would have stopped the case before [*114 any evidence of assault had been offered by the Crown. Could the prisoners in such case have pleaded *autrefois acquit* of the assault?

The *Solicitor General*. In *R. v. Rooke*, Central Criminal Court, Aug. 1850, it was proved that the ill-treatment had taken place many months before, but there was no evidence to connect the death with the violence, and it was proved that the deceased had died from natural causes, still Baron PLATT held that the prisoners might be convicted of an assault. He (the *Solicitor General*) was desirous of treating every decision with the greatest possible respect; but he owned he could not understand the principle upon which that decision was come to, because it would almost seem from that, that you might convict a man of an assault upon an indictment charging another offence, if it turned out that at some time or other the man had committed an assault. There are many cases in which in order to shew the mind and disposition of the accused towards the deceased—to shew a grudge of old standing—it might be very important to introduce evidence of an assault, but supposing the proof wholly to fail in connecting the prisoner with the death, could any one say that the jury could turn round and convict the party of an assault? What limitation would the Court apply to the statute? Was not the true principle to be collected from all the cases—that a party might be convicted of an assault where an indictment for felony involved a charge of violence, if the assault was so immediately connected with the felony so charged, that on a failure of proof of any of the circumstances to constitute the felony, the transaction actually proved was, at all events, clearly an assault? It was quite clear that the acts charged in this second indictment did not

*115] occasion the *death, and therefore these parties were not before put in peril. It has been contended that they must be taken to have been in peril, because it is conceivable that they might have been convicted of murder, had the evidence been different, or the jury taken a different view of it. But we must look at the actual facts. They shew that the Counsel for the prisoners relied on the very fact, that the assaults were wholly disconnected from the death; and on the second trial the proof was precisely the same. Further, the statute said that in cases of felony, where the evidence did not warrant a conviction for the felony, the jury might convict of an assault. But was it *obligatory* upon the jury to convict of the assault? or was it *incumbent* on the Judge to direct the jury to convict of the assault? He apprehended not.

POLLOCK C. B.—Does the statute bring the assault before the jury with all its consequences, or does it merely *authorize* the jury to convict, so that such conviction shall not be bad on error, which at common law it would be? The framer of the statute never contemplated all the consequences arising from the incidents of pleading.

The *Solicitor General*. Suppose *A.* indicted for a felony, the case proved; the Judge sees that the jury are unwilling to convict, and that if they have the loophole of a verdict of assault, they would avail themselves of it; *must* the Judge give them such loophole? Surely this statute cannot be construed to make it *imperative* on the Judge to be a party to such a defeat of justice.

V. WILLIAMS J.—Your argument seems to prove too much. Would it not equally apply to a case of murder, where the jury might be bent on acquitting of the murder, and convicting of the manslaughter? Yet
*116] *there the Judge would have no discretion in the matter.

The *Solicitor General*. There is this distinction. Manslaughter is involved in murder.

V. WILLIAMS J.—At common law there could not be a conviction for an assault on a trial for murder, because it was a misdemeanor; it thus was taken out of the general rule that on an indictment for any offence of a compound nature, there might be a conviction of any one of the criminal elements of which such offence was composed. The statute has brought it within the rule, although it has left the original reason of the exception unaffected. It is thus a wholly anomalous case.

The *Solicitor General*. Suppose twenty assaults charged in the indictment, would the statute authorize a conviction of the assaults? It is said that it would, because there might be twenty distinct counts. But in an indictment for felony the prisoner has the right to put the Crown to an election, and therefore there could only be a conviction on one count. Here therefore as the various assaults were all introduced merely because they were supposed all to verge together and blend in one crowning conclusion, there could only be a conviction of one assault; and the statute evidently contemplates such a result. The jury therefore must either be empowered to select one particular assault, or to convict of a great number. Must they so select? If so, then the plea of *autrefois acquit*, according to the view on the other side, would entitle the prisoners to go scot free, if charged afterwards with the other nineteen assaults.

POLLOCK C. B.—You say that the statute must be construed to mean that if the prosecutor prove an assault so connected with a felony as to form part of *the transaction charged as a felony, but fails to shew [*117 that such assault actually became a constituent part of the felony so as to have an actually felonious character, then the jury may convict of an assault. The punish-

ment seems to shew that the Legislature never meant it to apply to mere common assaults.

The *Solicitor General*. It is said that if the assault is charged in the indictment, and brought before the jury in evidence by the Counsel for the Crown, then the plea of *autrefois acquit* applies. That is contrary to the criterion to be found in *R. v. Vandercomb*, 2 Leach, C. C., case 276, and *R. v. Birchenough*, 1 Moo. C. C. 477; *S. C.* 1 Greaves's Russell, 836, 7.

MARTIN B.—Assume, for argument sake, that the second count were the only count in the indictment, and that the Crown had proved all the assaults there charged, that then the prisoners had called the surgeons, and that the medical evidence shewed that the death was not caused by the assaults charged and proved; the prisoners would have been acquitted; but would they not have stood their trial and been in peril of a legal conviction? What substantial difference is there between that case and the present?

The *Solicitor General*. The statute creates the difficulty in this case. Now as to the misdirection. The pleadings raise this issue. Have the parties been acquitted before on this charge? The Judge's direction is in effect this. They have been tried for some assaults, but only for assaults connected with the death; therefore the only question now is, whether the assaults here charged were the assaults which caused the death? He merely meant to point out that on the first trial the prisoners would not have been liable for any assaults other than such as conduced to, or caused the death, *i. e.*, were connected with the death in the way of cause or effect. "*Con-*
 *118] *duced to*" *is an expression more favourable to the prisoner than "*connected with.*" The direction was therefore right.

Slade and *Cox*, in reply, called the attention of the

Court to the great number of decisions, as well of single Judges as of the whole Bench, which would be overruled, if the *Solicitor General's* argument were to succeed: also to the position in which the prisoners would have been placed in consequence of those decisions, had TALFOURD J. left the question of assault to the jury and they had returned a verdict of guilty; that in the face of those decisions the prisoners on a case reserved would not have had the least chance of a favourable decision. Why then should the Crown be entitled to greater favour, when *R. v. Crumpton*, C. & M. 591, was the only authority on that side?

V. WILLIAMS J.—You say that the Judge was bound to put the question of assault to the jury: and that the prisoners were therefore put in peril of a conviction. Suppose the case of a woman indicted for the murder of her bastard child, the jury are at liberty under stat. 9 Geo. 4, c. 31, s. 14, to acquit of the murder, and to find her guilty of endeavouring to conceal the birth. Is the Judge bound to leave this alternative to the jury?

Slade. In my opinion he is.

Cur. adv. vult.

On *Saturday*, 25th *January*, A. D. 1851, this case was re-argued in the Court of Exchequer, before the fourteen following Judges—Lord CAMPBELL C. J., POLLOCK C. B., JERVIS C. J., PARKE B., PATTESON J., ALDERSON B., COLERIDGE J., MAULE J., WIGHTMAN J., CRESSWELL J., ERLE J., V. WILLIAMS J., TALFOURD J., and MARTIN B.

**Slade* for *R. C. Bird*. *Cox* for *S. Bird*.

The *Solicitor General*, and *Rowe Q. C.*, and *Karlake*, for the Crown. [*119]

Slade read the case, and on his mentioning that a portion of the case had been struck out on his application, with the consent of the Counsel for the Crown, but without the knowledge of the Judge who had reserved the

case, some discussion took place as to the power of Counsel to make such alteration in a case reserved, without the express sanction of the Judge by whom the case had been stated for the opinion of the Court of Appeal; but as, on referring to the Master, it was found that the alteration had been made by the order of the Court to whom the case had in the first instance been referred, the case was heard in its amended form.

Slade then said he should submit two propositions, and if he succeeded in establishing either of those propositions he should submit that he was entitled to the judgment of the Court. The first proposition was, that the true issue raised by the pleadings was not presented to the jury, but another and a totally different issue, and that if the true issue had been put, the prisoner would have been entitled to a verdict. The second was a general proposition of law, that a jury having already had the prisoners in charge upon those assaults, upon a felony which included the assaults, they could not be tried again. The prisoners were tried at the Spring assizes for the murder of *Mary Ann Parsons*. The cause of death was stated in as many as six counts. He admitted that it was not necessary to prove all the assaults precisely as laid, nor was it necessary to prove the time at which it was stated they had taken place, but it was material to consider the mode in which the prosecutor had stated his case, for the Court would then be able to collect that these assaults were part of the act and transaction *which the Crown had prosecuted as a
*120] felony by the indictment. *R. v. Birch*, 1 Den. C. C. 185, shewed that that was the test by which they were to arrive at the conclusion whether a party, on a charge of felony, including an assault, could be convicted of an assault. In this case there could be no doubt it was so, for it was not only so charged, but it was opened

by the Counsel for the Crown that they should rely upon the assaults as tending to prove the charge of murder. At the trial for murder three assaults were proved, and three were relied upon. The first was proved to have taken place on the 5th of *November*; the second at the end of *November*, or beginning of *December*; and the third on the 11th of *December*. No other assault was proved. On the second trial the same three assaults were proved, and no other. The first trial proceeded at very great length until it was necessary to call the medical evidence to prove the cause of death. The medical men swore that the cause of death was a blow upon the head, given apparently shortly before death, and, as there was a total absence of evidence to shew whether either of the prisoners gave the blow, the prisoners were acquitted. This evidence of the medical men came upon the Crown completely by surprise, and the Counsel were not prepared to argue whether the parties could be convicted of an assault. It was asked by the learned Judge whether they could not be convicted of the assault? He (*Slade*) submitted that they could not, and cited *R. v. Crumpton*, C. & M. 597, and there was an end of the question. There was no argument.

TALFOURD J. said, What took place was, I believe, this; when I was asked whether the prisoners could not be found guilty of an assault, I asked whether there was any evidence of a joint assault? Then some assault was mentioned which I said seemed to be quite unconnected with the death; and while I was saying *this, *R. v. Crumpton*, was cited as an authority against a [*121 conviction for an assault in such a case, and as the Counsel for the Crown said that they could carry the case no further, I directed an acquittal.

Slade. At the last Summer assizes these prisoners were indicted for an assault, and that raised the question

whether they might be again tried for an assault. The prisoners put in a plea of *autrefois acquit*, that the assaults included in the felony and murder charged upon them, of which they had already been acquitted, were the same as those charged in the present indictment. The replication was that they were not acquitted of the felony and the murder, including the same assaults charged in this indictment. The learned Commissioner, before whom this trial took place, put the prisoners to the proof of the identity of the assaults, though he (*Slade*) contended that it was for the Crown to prove the non-identity; and he then proved the identity of the assault charged in the second indictment with one of those charged and proved at the former trial. The learned Commissioner then directed the jury that if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown. That was not the proper issue; the prisoners had no chance upon that direction. If the assaults had conduced to the death of the deceased, the prisoners were guilty of murder, and should have been convicted on the first trial. This was an issue which the learned Judge was not justified in pressing upon the prisoners, and it amounted to such a misdirection that he submitted the prisoners were entitled to the judgment of the Court. No such question as that left to the jury by the learned Commissioner arises on the record; for the replication *122] admitted that *there was a *good subsisting judgment* of acquittal, and raised the simple question, were the prisoners thereby acquitted on a charge of *the same beatings in fact* as they are charged with on the second indictment? The replication in effect said, "I admit you were tried before; I admit you were acquitted on that trial, and that there is a good subsisting record of

acquittal; but I say that the facts alleged against you on that trial were totally different from the facts alleged against you on this, and therefore you are not entitled to an acquittal." Thus the replication and the plea together raised the simple issue of *the identity of the assaults in point of fact*, and as they were confessedly the same, the prisoners were entitled to an acquittal. For even assuming that *upon the evidence as given at the first trial*, there could not have been a conviction for an assault, (whether the Judge had directed the jury according to the dictum in *R. v. Crumpton* or the decision in *R. v. Birch*), still, that had nothing to do with the question raised by the pleadings, for it would merely shew that the Crown had chosen to prosecute for an offence on which they ought to have known the evidence would probably not enable them to get a conviction. But having so prosecuted, the prisoners have been in peril—they have incurred a chance of being convicted, and by the law of England may not a second time be put in peril on *the same facts*, which the Crown has by a former failure at last learnt to deal with less unskilfully. If the Crown wished to raise the other issue it should have been raised by the pleadings, and then the important question might have been discussed whether it was necessary, in the case of murder, that an assault of which the party might be convicted under the stat. 7 Wm. 4 & 1 Vict. c. 85, s. 11, must be an assault conducive to the death; but upon these pleadings *that was not raised. The point [*123 was only glanced at when this case was argued before the Court of Appeal. If the Counsel for the Crown had replied to his plea that none of these assaults conduced to the death, he would have demurred, he would not have gone to trial upon that replication.

LORD CAMPBELL C. J.—The matter turns upon the construction of stat. 7 Wm. 4 & 1 Vict. c. 85, s. 11. If,

upon the construction of that act of Parliament, the prisoners might have been convicted on the first trial of an assault, then, upon the second, they would be in peril a second time.

ALDERSON B.—If they could have been convicted the first time no doubt they were in peril.

Lord CAMPBELL C. J.—They could not have been convicted of the assault except under Lord Denman's Act, and therefore that is the question.

Slade submitted that that did not get rid of the question whether the proper issue had been left to the jury. He would now turn to the second proposition, that the prisoners, having been once in peril, cannot now be tried again for the same offence.

Lord CAMPBELL C. J.—You have only to shew that they were in peril the first time for this offence, with which they are charged on the second occasion.

Slade then cited and commented on the same cases which he had already brought before the notice of the Court of Appeal, and in addition, *R. v. Brimilow*, 2 Moo. C. C. 122.

In the course of the argument, PARKE B. said that the judgment in the case of *R. v. Birch*, referred to two classes of assaults; one, those which conduced to the felony; another, those which were wholly disconnected with it; and it was there determined that the operation of the stat. 7

*124] *Wm. 4 & 1 Vict. c. 85, s. 11*, was not on the one hand, to be confined exclusively to the *former class, nor on the other to be extended to the latter; but that it related to such assaults as were included in the felony charged, either expressly or by legal implication, and were part of the very act or transaction which the Crown prosecuted as a felony by the indictment.

ALDERSON B. said, if the assault was charged in the first indictment, and the jury might legally have found

the prisoners guilty of the murder upon any evidence which might conceivably have been given to prove those assaults, then they have been in peril before about these assaults, and cannot be tried a second time.

LORD CAMPBELL C. J. said, that the question whether the parties had been in peril before could not, as regarded the evidence, depend solely on whether the evidence offered in support of the second indictment had been in point of fact offered in support of the charge contained in the first; for though offered it might be inadmissible on the first trial. It must be legal evidence and relevant to the charge. In this case I do not see why, if the jury had chosen to think the medical evidence unsatisfactory, or to disbelieve it, the prisoners might not legally have been convicted of the murder. It is contended, on the part of the prisoners, that the jury should have been directed to consider whether the assault charged in the second indictment was the same as any of the assaults charged in the first indictment as a part of the felony, and given in evidence in support of such charge.

PARKE B. said the question was, whether the assault in the second indictment formed part of the felony charged in the first indictment, as explained by the evidence given on that occasion on the part of the prosecution.

MAULE J. said, suppose at the first trial a series of *assaults proved, and a death, but it to be quite [*125 uncertain whether the death had been caused by the assaults, or by some other cause, it is difficult to see why the prisoners could not have been convicted of an assault. Suppose A. charged with the murder of B., a body found, supposed to be that of B., and at the trial B. to appear and give evidence against A. of assaults, why should not the jury acquit A. of the felony and murder, and convict him of the assault?

Cox, for *S. Bird*, was stopped by Lord CAMPBELL C. J., who observed that as there was only one plea of *autrefois acquit* pleaded by both of the prisoners, the practice of the Court was only to hear one Counsel on a side. In *Frost's case*, 2 Moo. C. C. 145, note, the prisoners had pleaded separately and been tried separately. But upon hearing that *Slade* and *Cox* had been under the impression that they should both be heard, and had arranged the argument with that view Lord CAMPBELL C. J., intimated that, under those particular circumstances, the Court would hear him.

Cox then used the same arguments that he had addressed to the Court of Appeal.

Rowe Q. C., for the Crown, (a) admitted that if the prisoners could have been legally convicted of the assault in question on the first trial, they could not be tried for that assault again; but contended—1st, that they could not have been so legally convicted; 2d, that they had not in fact been acquitted of that assault.

Lord CAMPBELL C. J.—They were acquitted on the first trial of every charge upon which they might have been convicted. Therefore the only question is of what *126] might they have been convicted on the first *trial? The whole case turns upon the construction of the statute.

Rowe Q. C. The words in the statute “when the crime charged shall include an assault,” need not mean “crime averred on the face of the indictment.”

ALDERSON B.—No. It means such crime as in its nature includes an assault, even though that assault is not expressly averred in the indictment. Thus manslaughter may or may not include an assault; a manslaughter by blows, &c., does so, and manslaughter by negligence, &c., does not; so administering poison with intent to murder

(a) The Solicitor General had left the Court.

does not *necessarily* include an assault; *R. v. Draper*, 1 C. & K. 176.(a) It was for this reason that the Judges in *R. v. Birch*, 1 Den. C. C. 185, suggested that the indictment should expressly aver an assault in those cases to which the statute applied.

MAULE J.—But of course if an assault is improperly averred, that will not make the crime charged include an assault within the meaning of the statute. But in this case the first indictment charges an assault *ex vi termini*, for it charges a death by beating; the word assault need not be used in such a case as that.

Rowe Q. C., contended that the assaults charged in the first indictment were wholly unconnected with the felony and murder, and that the words of the stat. 7 Wm. 4 & 1 Vict. c. 85, s. 11, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and *to find a ver- [*127 dict of guilty of assault against the person indicted, *if the evidence shall warrant such finding*," shewed that the prisoners could not have been convicted of the assault, because the evidence did not warrant such finding. On being asked by Lord CAMPBELL, to give a definition of a disconnected assault, he referred to *R. v. Crumpton*, C. & M. 600, where PATTESON J. said, "I think that, no assault is included in a charge of manslaughter which does not conduce to the death of the deceased, although the death itself be not manslaughter. Here the surgeon disconnects this assault from the death; and I think, therefore, that the prisoner is entitled to be acquitted altogether."

(a) This case seems to shew that where the crime charged in the indictment may include an assault, but no assault is expressly or impliedly averred in the indictment, it will depend upon the nature of the crime, *as ascertained by the evidence*, whether it includes an assault or no, so as to come within stat. 7 Wm. 4 & 1 Vict. c. 85, s. 11. It seems that the indictment *per se* would be an insufficient test. *Comp. R. v. Dilworth*, 2 M. & R. 531.

LORD CAMPBELL C. J. said that if that statement were a little qualified it would be an excellent description.

PARKE B. said that the view there taken by PATTESON J. rather favoured the opinion expressed in 1 Greaves's Russell, 782, note(*f*), that the statute was only intended to apply to inchoate felonies. But that doctrine had been overruled by *R. v. Birch*, 1 Den. C. C. 185, and the true construction of the statute was there given.

Rowe, Q. C. cited *R. v. Connor*, 2 C. & K. 519.

MAULE J.—That in that case the report left it uncertain in what form the crime is charged in the indictment. From the report it would seem probable that it included an assault. But, suppose an indictment to charge a death by stabbing, it would not be a parallel case to the present; for here the death was ascribed to a series of acts, any or all of which may probably turn out to have been the cause of it.

ALDERSON B.—Suppose you translate into plain language what actually took place on the first trial. The

*128] Judge said to the jury, "Two sets of assaults *have been given in evidence; one set alone is said to have caused the death; the other set is said not to have caused it. If you are of opinion that the prisoners committed the former set, and that they thereby caused the death, it is your duty to find them guilty of the murder; if not, it is your duty to acquit them." The jury thereupon found that the former set caused the death, but that the prisoners did not commit them; and as to the latter set, they are then told that, whether the prisoners committed them or not, they could not find them guilty of them; and they are thereupon acquitted. But prior to the verdict being given, were not the prisoners in peril? The latter set of assaults are not disconnected from the murder till the verdict has been given. The

jury might have found that they caused the death, and were committed by the prisoners.

Rowe Q. C. said, that the evidence was all one way, and that the Judge could not let it go to the jury, except as evidence for an acquittal.

COLERIDGE J.—That depended solely on the medical evidence, and the effect of that evidence was a question of fact for the jury to determine. They might not have agreed with it, and might have thought that the death proceeded from the previous assaults.

Lord CAMPBELL C. J.—You are trying to shew that the assaults were clearly unconnected with the death, whereas, in point of fact, they were given in evidence as the causes of it, and might have been found to have caused it, had the medical evidence either been indifferent, or been disbelieved, or not been given at all. If you say that the medical evidence shewed that the assaults were disconnected from the death, it is saying that the assaults were connected at one time with the death, but afterwards were *disconnected from it by something prior to the verdict. Unless you [*129 can shew that this evidence was inadmissible, and that, therefore, the Judge ought not to have left it to the jury, the prisoners would have been in peril upon that trial.

ALDERSON B.—The assault would be connected with the felony, if the jury found the facts in one way, and disconnected from it, if they found them in another way. Till the verdict was given, it was impossible to say whether they were connected or disconnected. The verdict is the only criterion in such a case.

Rowe Q. C. cited *R. v. Phelps*, C. & M. 180; *S. C.* 2 Moo. C. C. 240.

Lord CAMPBELL C. J. said that the decision in that case proceeded on the supposition of the assault being quite distinct and separate from the felony.

Rowe Q. C. Suppose the evidence to have shewn that one of the prisoners alone had given the blow which caused the death, could the other have been convicted of an assault committed at a different time? (a) Another question in this case is, whether this statute authorizes a plea of *autrefois acquit* upon an acquittal of an assault?

JERVIS C. J. said, that the case reserved did not raise that point. The question whether the plea was bad or no, was on the record, and was therefore matter of error.

Rowe Q. C. then contended that there was no misdirection. In the course of the above arguments, he commenced on the several cases cited on the other side, and cited *R. v. Gisson*, 2 C. & K. 781; *R. v. Watkins*, 2 Moo. C. C. 217; *R. v. Allen*, 2 Moo. C. C. 179.

*PATTESON J. asked the Counsel for the prisoners, *130] in what form a verdict of guilty of assault could have been entered on the record on the first trial?

ALDERSON B. said, that a verdict of guilty of assault could have been entered on the 1st, 2nd, and 3rd counts, and a verdict of not guilty on the other counts of the indictment.

WIGHTMAN J. asked whether, if *Mrs. Bird* had been found guilty of giving the fatal blow, but that the husband had been away at the time, he could have been convicted of an assault?

Cur. adv. vult.

On the 12th *February*, A. D. 1851, the Judges not in the Court of Queen's Bench, and delivered the following Judgments *seriatim* :—

(a) The answer to this seems to be, that the latter prisoner could not be convicted of such assault; but still he would have been in peril once for that assault; and prior to the verdict it would have been uncertain whether he could have been convicted or no.

Names of the Eight Judges who affirmed
the conviction.

POLLOCK C. B.
PATTESON J.
COLERIDGE J.
WIGHTMAN, J.
CRESSWELL J.
ERLE J.
V. WILLIAMS J.
TALFOURD J.

Names of the Six Judges who thought
that the prisoners were entitled to
an acquittal.

LORD CAMPBELL C. J.
JERVIS C. J.
PARKE B.
ALDERSON B.
MAULE J.
MARTIN B.

MARTIN B.—The prisoners were indicted at the *Exeter* Spring assizes, 1850, for the murder of *Mary Ann Parsons*. The indictment contained six counts. The first charged the murder by striking with a stick; the second by divers beatings between the 5th of *November*, 1849, and the 1st of *January*, 1850; the third, by beatings on the 5th of *November* and 1st of *December*, 1849, and the 1st of *January*, *1850, and on divers other days between the 5th of *November* and the 1st of *January*; [*131 the fourth, by blows inflicted with a scourge, and the fifth and sixth, by casting her on the ground.

At the trial of the indictment, the Counsel for the prosecution opened all the above assaults as conducing to the death, but stated, that if he should fail in proving that they conduced to the death they would furnish evidence of the *animus* of the prisoners.

It was proved at the trial, that the death (which took place on the 4th of *January*, 1850) was caused exclusively by one particular blow on the head, and there being no evidence that this blow had been struck by either of the prisoners, they were acquitted.

At the last *Exeter* Summer assizes the prisoners were indicted for the misdemeanor of having assaulted *Mary Ann Parsons*. The prisoners pleaded *autrefois acquit*,

which was traversed, and issue joined thereon. The record of the former trial was put in evidence, and it was proved that evidence had been given thereat of different assaults committed by the prisoners upon the deceased throughout the months of *November* and *December*, 1849; one on the 5th of *November*, with a stick, another at the end of *November* or beginning of *December*, also with a stick; and another with a furze-bush about the 11th of *December*; and it was not proved at the second trial that there were any other assaults committed but those which were given in evidence at the first trial.

The learned Judge directed the jury, that if there were several distinct and independent assaults, some or one of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown. Upon this direction the jury found a verdict for the Crown. And the learned Judge stated a case, containing the foregoing statement, for the opinion of this Court.

*The substantial question now to be decided is, *132] whether, upon the trial for the murder, the prisoners could lawfully have been convicted of these assaults under the 11th section of the statute 7 *Wm.* 4 & 1 *Vict.* c. 85, for it was conceived by the Counsel for the Crown, that if they could have been so lawfully convicted they could not be tried a second time for the same assaults, the principle of law being, that a person cannot be more than once put in peril of the same character for the same act or acts.

I am of opinion that they could have been so lawfully convicted.

The section enacts, "that on the trial of any person for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict

of guilty of assault against the person indicted, if the evidence shall warrant such finding."

I think the true rule for the construction of a statute is that laid down by BURTON J., in *Warburton v. Loveland*, 1 Hudson and Brooks' Irish Rep. 648, and stated by PARKE B., in 2 M. & W. 193, viz., That Courts ought to adhere to the ordinary meaning of the words used, and to the grammatical construction, unless that is at variance with the intention of the Legislature, to be collected from the statute itself, or leads to any manifest absurdity or repugnance, in which case the language may be varied or modified so as to avoid such inconvenience, and no further.

Now to apply this rule to the present case. The first trial of the prisoners was for a felony. The crime charged, viz. murder by violence, included, in all the several counts of the indictment, assaults against the person; the evidence of the assaults was lawfully given and received in proof of the alleged murderous death. The jury acquitted of the felony; *and the evidence in point of fact clearly warranted the finding the [*133 prisoners guilty of assault, and so also in law, inasmuch as there was no lawful excuse or justification of them. The case, therefore, seems to me to fall within the very words of the statute.

Then, is this construction at variance with or repugnant to the intention of the Legislature, to be collected from the statute, or does it lead to any manifest absurdity? It seems to me that it is in conformity with the intention of the Legislature, so far as I can collect it, and I am not aware that any one has contended that it is absurd.

The statute was to amend the laws relating to offences against the person. At common law a misdemeanor could not be joined in the same indictment with a felony and the consequence was, that in all cases of alleged

felonious offences against the person, if the prisoner was acquitted of the felony he was free altogether upon that indictment, and a fresh indictment was necessary in order to bring the offender to justice. The object of this enactment was to prevent this necessity and make provisions for the conviction and punishment of the offender on the then present trial—and it seems to me that the object and spirit of the enactment is to enable the guilty person, although he be acquitted of the felony, to be at once convicted and punished for assault, if he be charged with it in the indictment.

If the construction contended for by the Counsel for the Crown be the correct one, and the assault must conduce to the death, the consequence seems to me inevitable, that in all cases of alleged murder or manslaughter there cannot be a conviction for an assault at all under the statute, for if the assault conduces to the death, the party whose assault is so conducive *must either
 *134] be guilty of murder or manslaughter, or his assault must be a lawful and justifiable act.

It would be absurd to contend, that a lawful and justifiable act would be an assault within the meaning of the section, and, therefore, it seems to me the argument for the Crown must go the length of contending that the statute does not apply to cases of murder or manslaughter at all.

I do not think it necessary to go into cases of other felonies, although I believe the same consequence will legitimately follow from the same line of reasoning, and the statute would (if it be correct) be wholly operative.

But I do not think this is the correct construction of the statute, and, in my opinion, the true criterion is, *First*, Is the assault, in point of fact, charged upon the face of the indictment, and, *secondly*, is it part of the act or transaction which the prosecutor gives evidence of as

conducive to the felony? If it falls within these two categories, in my opinion the prisoners may be lawfully convicted of it by virtue of the statute. The third count of this indictment charges beatings on the 5th of *November*, and 1st of *December*, 1849, and the 1st of *January*, 1850, and on divers other days between the 5th of *November*, and the 1st of *January*. Suppose there had been no evidence in respect of the particular blow which is said to have caused the death, and the jury had not been satisfied that the beatings (which it seems to me are specifically stated in this count) had caused the death, but that the case had been left to them by the Judge as a fair case for the exercise of their judgment. If these beatings conduced to the death, the prisoners were guilty either of murder or manslaughter—but if they did not conduce to the death, according to the argument for the Crown, the *jury ought to have been told that they could not find the prisoners guilty of the assault. [*135

It seems to me that the statute was intended to meet this very case; and if so, I think the evidence in respect of the particular blow that caused the death cannot alter it.

Again, suppose the evidence in respect of the particular blow had been given by a witness called on behalf of the prisoners, it would have been a question of fact for the jury, whether the violence by the beatings or by that blow caused the death. This seems to me to be directly within the statute, and it cannot, in my judgment, make any difference whether the evidence was given at the trial by a witness called on behalf of the Crown or of the prisoners.

On the argument, a great number of cases were cited, but there are only three to which I think it necessary to refer, *viz.*, *R. v. Phelps*, C. & M. 180; *R. v. Crumpton*, *Ibid.* 597, which were principally relied on by the Coun-

sel for the Crown; and *R. v. Birch*, 1 Dent. C. C. 185; *S. C.*, 2 C. & K. 193, which was principally relied on by the Counsel for the prisoners.

R. v. Phelps was tried at the Summer assizes, 1841, and the report states, that the first count of the indictment charged the prisoners as principals in the first degree for the murder of *John Overbury*, by striking and beating him. The second and third counts charged *Phelps* as principal, and two others as principals in the second degree, in the following form:—"That the said *South* and *Smith*" (the two other persons in the indictment with *Phelps*), "at the time the felony and murder was committed, were feloniously present, abetting, aiding, and assisting the said *John Phelps*."

The statement of the evidence is, that as the deceased
 *136] *was going away from a public-house, *Phelps* struck him several times, and he was afterwards killed by violence; and the evidence went to shew that the prisoner *Phelps* had gone away before the violence which caused the death was inflicted. The charge of murder, therefore, failed, and the prisoner *Phelps* was found guilty of an assault. The Counsel for the prisoners objected that *Phelps* could not be convicted of the assault, as the assault was totally independent of the felony. It was urged by them, that it was only when the assault is included in the felony charged, that a conviction for an assault can take place. That the case was the same as if *Phelps* had struck the deceased, and afterwards some person wholly unconnected with *Phelps*, and not knowing that he had struck the deceased, had killed him after *Phelps* had gone away. Mr. Justice COLTMAN reserved the point, and the Judges were of opinion that the conviction for the assault was wrong.

I think this case distinguishable from the present. According to the report, the indictment does not charge

the prisoner with beating the deceased, specifying with particularity and precision certain beatings alleged to have been given, and drawing a conclusion that thereby the death was caused, but rather seems to charge as the beatings those only by which the death was effected. Now, if this be the true construction of the indictment, the decision is exactly conformable to my view of the right construction of the statute ; for the beatings charged in the indictment would be the beatings which caused the death,—beatings with which *Phelps* had nothing to do, and therefore the beatings which *Phelps* inflicted were not charged in the indictment at all ; and if so, in my opinion he could not be lawfully convicted of them.

But in the present case, the beatings which are charged *in the indictment for the misdemeanor, are the same identical beatings which are charged in the [*137 indictment for the felony, stated and ear-marked, as it were, with certainty and precision. In the latter indictment, it is true, a false conclusion in fact is alleged, namely, that they caused the death, which they did not. But they were charged in the indictment as the cause of death ; and, as I have already said, in my opinion it was competent for the jury to find the prisoners guilty of these beatings, and to acquit them of the felony. If, however, the indictment, did charge the specific assaults committed by *Phelps*, I can only say, that the judgment seems to me to be at variance with the subsequent case of *R. v. Birch*, which I consider a better authority and in point with the present case.

R. v. Crampton was tried at the Spring assizes, 1842, and the first count of the indictment charged that the deceased was the apprentice of the prisoner ; that it was the duty of the prisoner to suffer and permit him to take such proper exercise as was necessary for his bodily health, and to find and supply him with proper and ne-

cessary nourishment, medicine, medical care and attendance, and that the deceased being weak in body, the prisoner struck and beat him, and forced him to work for an unreasonable time, and would not allow him to take proper exercise and recreation, and neglected to supply him with proper nourishment and medicine, medical care and attendance, by means whereof he died. The second count charged, that the deceased, being such apprentice, the prisoner feloniously did make an assault on the deceased, and being weak in body, the prisoner forced him to work for unreasonable and improper times, and beat him, by means whereof he died.

The evidence was, that the prisoner was a tailor, and [*138 the deceased was his apprentice; that the latter had been in ill health for a year before his death, and had a bad cough, and was kept at work on some occasions from six o'clock in the morning until eight or nine in the evening, and that about five weeks before his death the prisoner beat him with a small cane; that about three weeks before his death he left the prisoner's house and went to his grandfather's, where he died; and the surgeon, who made a *post mortem* examination, stated that he died of consumption, that over work and ill usage might have accelerated his death, but he was not able to say that it had done so; he stated also that there were some bruises on his legs, but that they could not have at all contributed to his death.

It was urged that the prisoner might be convicted of the assault. Mr. Justice PATTESON is reported to have said, "I think that in order to convict a person of an assault under the statute, it must be an assault which is the subject-matter of the charge, and embodied in the charge, and which would itself be the felony but for some other cause." Now this in my judgment is the true construction of the statute, and it is because the assaults in

the present case were the subject-matter of the charge, and embodied in the charge, and if the death had arisen from them they would have been the felony, that I am of opinion that the case is within the statute. But the learned judge goes on to say, "I think no assault is included in a charge of manslaughter, which does not conduce to the death of the deceased, although the death itself be not manslaughter;" and as the surgeon disconnected the assault from the death, he directed an acquittal altogether.

Upon the best consideration I have been able to give to this question, I cannot concur in this latter part of *his Lordship's judgment. The conducing to the death does not in my opinion form the test. [*139

In *R. v. Birch*, which was tried at the Spring assizes, 1846, the indictment charged the prisoner with an assault and a robbery of a watch and money. The person supposed to have been robbed did not appear at the trial, but witnesses, who saw the transaction, proved that the prisoner struck the person named in the indictment. The jury stated that they were not satisfied that there was any intent to rob, and they found the prisoner guilty of an assault. Mr. *Armstrong*, who tried the indictment (after consulting with Mr. Justice *PATTESON*,) reserved the case for the opinion of the Judges. They were unanimously of opinion that the conviction was right, and in delivering their judgment they gave an exposition of the statute. It is thus stated in 1 Den. C. C. 186, "The enactment is not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor is it to be extended to all cases in which the indictment for a felony on the face of it charges an assault. In order to convict of an assault under the section, the assault must be included in the charge on the face of the indictment, and

also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment." It is thus stated in 2 C. & K. 194, "The opinion of the Judges was, that the statute applies whenever the indictment charges an assault, and the jury, negating the felony, finds guilty of the assault, provided always that the finding be in respect of the very same acts which the Crown seeks to make felonies, identity being the question, and not the intention of the prisoner to commit felony; otherwise the statute would not apply *140] to the ordinary cases *of wounding with intent," &c. In my opinion this is the correct exposition of the statute.

But even supposing I did not concur with this judgment, it seems to me, it would nevertheless be my duty to submit to it; it is the unanimous judgment of the Judges given judicially upon the construction of a statute, and if such a judgment is not to be held conclusive, I am at a loss to know how certainty in the law can be attained. I do not mean to say that, if the very improbable case occurred of an unanimous judgment being clearly and obviously and manifestly wrong, I would consider myself absolutely estopped from exercising my own reason and judgment in respect of the point decided; but what I mean is, that if there be an unanimous judgment upon a point of difficulty and nicety, upon which a difference of opinion might reasonably have existed, and did exist before such judgment, I think, after such judgment, I ought to be bound by it, and act upon it, and consider the matter settled and at rest.

In my opinion this judgment directly applies to the present case, and ought to be conclusive upon it.

As I am, therefore, of opinion upon the substantive question, that the prisoners were by law entitled to have had the verdict found for them upon the issue on the

plea of *autrefois acquit*, I do not think it necessary to give any opinion upon the other two questions raised by the Counsel for the prisoners.

TALFOURD J.—I am of opinion that this conviction is right, that the plea of previous acquittal was not and could not be sustained, and that the charge of the learned Judge who tried the issue joined on that plea, presented to the jury the only question which, if *decided [*141 in favour of the prisoners, could have entitled them to judgment.

On behalf of the prisoners two points were argued, and most ably argued, at the bar: *First*, that the prisoners might have been legally convicted of the assault, which formed the subject of the indictment for misdemeanor on the previous indictment for murder; and *Secondly*, that the learned Judge, at the trial of the issue on the special plea, misdirected the jury.

The first and main question turns on the construction of the statute, which, for the first time, enabled juries to convict of common assault in an indictment for felony; that statute passed "to amend the laws relating to offences against the person," and repealing antecedent acts, it proceeds to define the punishment of several offences of the description which its title indicates, and it is not immaterial to the true construction of the clause which refers to these offences to bear in mind their character. These are, attempts to murder by various means stated, producing wounds or bodily injury, which are made punishable with death; the attempt to administer poison, the act of shooting, the attempt to discharge loaded arms, the attempt to drown, suffocate, or strangle with intent to murder, though no bodily injury be produced, which are made felony and punishable with transportation; similar

acts committed with intents short of murder, made punishable also with transportation ; and other felonies which do not necessarily involve violence. All these crimes are, in their nature, single definite acts, not results from several acts, each act itself being a substantive felony.

The 11th section enacts, "that on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatsoever, where the crime charged shall *142] include *an assault* against the person, it *shall be* *lawful for the jury to acquit of the felony and to find a verdict of assault against the person, 'if the evidence shall warrant such finding.'" The consequence of such a verdict of guilty of assault may be, imprisonment for three years with hard labour, and solitary confinement for a month at a time, not exceeding three months in any one year, at the discretion of the Court.

Two questions arise upon this clause—what is the meaning of "the crime charged?" and what is the case in which "the evidence shall warrant the finding" of guilty of assault against the person?

By "the crime charged," I understand the act of felony of which the prisoner is accused, and for which he is tried, which, by the practice of the law well settled long before the statute, can only be a single felony, and in the case of murder must be, of physical necessity, single, when applied to one person. "The crime charged" has, in my judgment, no reference to the various statements which, at his will in various counts, the prosecutor places on the record, but to the *corpus delicti* for which alone, though variously stated, the prisoner can be required to answer; considered with relation to the context the meaning of this phrase is obvious; that whereas some of the offences "before mentioned" in the act *do* include an assault against the person, as rape or stabbing, and others *do not* include it, as the attempt to procure abortion or

the administration of poison, the statute applies its provisions to the former class of crimes and other felonies the like in character. To support the construction that the "crime charged" means the crime, as varied, and presented as many crimes on the face of the indictment, the words should have been "crime AS charged." It is further to be observed, that it is not necessary to state in the indictment that the party accused "made an assault," where *the offence necessarily implies violence, as has been decided in the case of rape [*143 (*R. v. Allen*, Moo. C. C. 179,) and will be found illustrated by the greater number of precedents of indictments for murder by violence in the second volume of Chitty's Criminal Law. The crime of murder is comprehended in the terms "any felony whatsoever," and therefore, if there is any case of murder to which the statute can be practically applied, it may be so applied; but considering that the statute enumerates many felonies of inferior atrocity to murder, of which the attempt to commit murder is the highest, all single acts, to which the application of the statute is easy, I do not believe it was in the contemplation of the Legislature to include, under the word "felony," cases of death, which are not cases of mere act, but of act followed by a consequence. Without, therefore, meaning to affirm that the case of murder cannot be brought within the statute, by reason of the insufficiency of its language, I think no argument will be supplied against a construction which excludes the case in judgment, if it should follow that few cases, or even no case of felony involving death, would be practically within its operation.

The next question, arising on the meaning of the words "where the evidence shall warrant such finding" is, when does the evidence warrant a finding of assault on an indictment for felony? The answer I offer is, when the

very assault which the crime includes, and which, either by reason of the noncompletion of a purposed felony, or the absence of intent, imparting to the assault a felonious character, though proved by the evidence, is also, by the evidence, shewn not to amount to felony. The word "an assault" in the first member of the clause, and the word *144] "assault" in the last member of it, are correlative *terms; they do not reasonably import, that if the crime includes one assault the party accused may be found guilty of another assault, but must be read as if the word "said" or "such" preceded that latter word "assault," in which case, thus far at least, the meaning would be clear.

If this construction, which seems to me to be the true literal interpretation of the passage is erroneous, I see no other sensible construction than that which has been repudiated in argument, that, wherever a crime includes an assault, and the evidence proves an assault, however unconnected with the felony charged, and for whatever purpose offered in proof, the statute applies. If once it be conceded that it does not so necessarily apply, I see no middle course that is not founded on arbitrary conjecture, and dependent on circumstances, rendering its application uncertain.

The intermediate course of construction proposed, I take to be, that wherever, in an indictment for murder, assaults are charged in any of its counts as the means of committing the felony, and those assaults are adduced in proof by the prosecution as conducing to the death, and are proved by the evidence to have been in fact committed, although by that evidence they are entirely disconnected from the *corpus delicti* charged, the party accused may be convicted of such assaults; and this, although the indictment contains a count correctly describing the means of the death, which is not brought

home to the prisoner. If this be so, consequences never contemplated may follow from the allowance of several counts in an indictment for murder. In case of murder, as in case of other felonies, each count on the face of it charges a separate felony, and yet it is obvious, that unless a different person be supposed to be murdered, *only one felony of death can be proved; and it is certain, that if the Court were apprised before [*145 plea that two distinct murders are meant to be alleged, they would quash the indictment, or if after plea, they would compel the prosecutor at once to make his election on which charge he would proceed. But if by the introduction of six counts into the indictment, stating the cause of the same death in six different ways, the prosecutor might obtain a verdict of guilty of assault, on any count which charged it, though the assault was proved in fact to have had no connection with the death, he would obtain the benefit of substantially charging as many felonies as counts, not to obtain a conviction of the principal charge, but of an assault altered in its penal consequences by arbitrary position on the record. Nay, if there should happen to be as many defendants as counts, and each count should charge (as it must) a different mode of death, and by different assaults, although the death should be proved to result from one act only, and that act committed by a single prisoner, or by a stranger, but each prisoner had committed such assaults as there alleged, each might be convicted of his own separate assault, and this although the prosecutor would not be permitted to prove more than a single felony as involving them. A single charge of murder may thus justify a conviction of numerous assaults on counts which may be introduced or used for the purpose of affixing to a single offence, or to such offences, aggravated penalties.

But again, the statute, when describing the offences to which it applies, uses the word in the singular, "an assault;" in stating the matter of which the accused may be convicted, it uses the word "assault." Is it assumed that the party accused can be convicted of more than one assault? If he cannot, there is an end *of
 *146] this plea of previous acquittal, because the second indictment in this case charges two assaults; and, surely, if the prisoners could only by law have been convicted of one on the former trial they were only in peril in respect of one, and the plea is no answer, unless one can be found to be identical with two. If it is contended that they may be so convicted, what is the consequence? A count in an indictment may charge divers assaults at least between the first and last days of a year, then assaults may be charged in general terms, under which proof of the most aggravated assault, or of assaults not amounting to batteries, may be offered, and a party, proved to have committed one of the slightest possible assaults, may be convicted and subjected to infamous punishment, which else could not have been inflicted.

If the circumstance, that the indictment comprises a count which charges assaults to which proof corresponds, does not bring the case within the statute, surely the opening speech of the prosecutor's Counsel, founded on instructions given by an individual client, though using the name of the Crown—perhaps made from imperfect materials, cannot change the legal character of an act elicited in proof, so as to affect the prisoner's liability to punishment. The evidence does not the more or less "warrant the finding," because of the preface made to it, or the purpose for which it is used. The question is not whether the proof of assault was relevant to the issue—as it might be to prove malice, or whether it was offered in the expectation that it would be shewn to be con-

nected with, by conducing to, the death,—but whether on the whole case developed in evidence, it was in very deed parcel of the act which is prosecuted as felony; this I take to be the doctrine acted upon by PATTESON J., in the case of *R. v. Crumpton*, and acted upon at the *first trial; and adopted by the learned Judge [*147 Mr. *Russell Gurney* on the second trial.

Of the authorities cited in argument the most important are, *R. v. Phelps*, decided in 1841, 2 Moo. C. C. 241, relied on for the prosecution; and *R. v. Birch*, decided in 1846, relied on for the prisoners, because these are the unanimous decisions of all the Judges. In *R. v. Phelps* the prisoner was indicted for the murder of *John Overbury*, who was slain in a scuffle. *Phelps*, with others, had assaulted the deceased on the evening of his death, but quitted the affray, which was afterwards renewed, and in which mortal blows were inflicted by persons unknown. There was no distinct evidence to shew what led to the second assault on *Overbury*, or to connect it with the prior assault by *Phelps*. The jury acquitted *Phelps* of the murder, but found him guilty of an assault, and the point whether he could be so legally convicted was reserved. The Judges were unanimously of opinion that the conviction was wrong, and they observed that “the assault must be such as forms one constituent part of the greater charge of felony, not a distinct and separate assault as this was.” It seems so difficult to distinguish that case from the case in judgment, that if this conviction be held wrong, it must in my opinion be by overruling that decision. Although in the case of *Phelps* the indictment is not set forth, it no doubt charged assaults by *Phelps* on the deceased by blows, like the second count in this indictment. In that case, there can be no doubt that proof of such blows was offered and received in evidence to prove the felony; in that

case, as in this, the evidence must have been given not to prove the *animus* merely, but the very act of felony; in that case, as in this, the assault so charged was proved; and in that case, as in this, the jury might have *148] found that the deceased died *of the blows given by *Phelps*, though others afterwards struck him; but in that case, as in this, the assault was disconnected from the death, which arose, in both cases, from the act of persons unknown. In the present case, as soon as the medical evidence referred the death to a blow inflicted by some person unknown shortly before the 4th *January*, 1850, assaults committed in the preceding *November* were at least as much disconnected from the death, as assaults committed by *Phelps* on the same day upon which the death occurred.

R. v. Birch is an authority entitled to the greatest respect, as being, like the case of *Phelps*, the unanimous decision of the Judges, and containing a development of the rule which, in the opinion of those Judges, should govern this class of cases; but I think, that rightly considered, neither the decision as applied to the facts of that case, nor its enunciation of principle, militates against the present conviction. The indictment charged a robbery with violence; the prisoner was seen with others, on the night in question, to strike the prosecutor several blows, but the proof of robbery failed; the jury found the prisoner guilty of assault under the statute, and the Judges held the conviction right. Here the very transaction indicted, and which included an assault, was proved, but it was found not to amount to felony, one of the cases clearly contemplated by the statute. How does this shew that a party can be convicted of an assault not associated with "the transaction;" that transaction being in verity the death charged, but produced by other means?

The Judges, on this occasion, considered the learned note in Mr. *Greaves's* edition of Russell on Crimes, in which he seeks to confine the operation of the statute to cases of inchoate felony, which (with the *highest respect for the learning of that excellent writer) [*149 is wholly untenable, as it would exclude the cases to which the statute was primarily intended to apply, when the act is complete, but the felonious intention wanting. They then lay down the rule, "that this enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault; but in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment." This rule disposes of the construction, that the charging an assault in the indictment is sufficient to warrant the finding of guilty of assault where an assault is proved, and taking the first clause in connection with the last, it seems to me to refer the words, "the very act and transaction," not to the *matter charged* in the indictment, but to the act itself, which is the sole subject of prosecution, and which depends not on the opening or motion of Counsel, but on the entire proof in the case, when developed before the jury.

If this view of the case in judgment, as applied to the statute, is correct, the summing up of the learned Judge presented the only question which could be raised properly to the jury. It is to be remembered that a plea of previous acquittal of felony, pleaded to an indictment for assault, is not like an ordinary plea of *autrefois acquit* of murder to another indictment for murder, and where the prisoner has nothing to prove but the identity of the

prisoner, and of the party whose death is charged as murder, to establish his plea. But it being conceded that there are cases in which an *indictment for felony *150] includes an assault, and on the trial of which an assault is proved, and yet on which the prisoner cannot lawfully be convicted of assault, and therefore, is not in jeopardy of such conviction ; it must, on every such plea, be matter of proof whether the prisoner could have been convicted of assault before, and that depends upon the question raised by the rule in *R. v. Birch*, whether the assault charged in the second indictment is part of " the very act or transaction " prosecuted on the first. This, the assaults secondly charged on the prisoners were not, unless they were part of the felony, death, which was the subject of the former charge, and in putting the question whether they conduced in any way to that death, the learned Judge put the question in the manner most favourable to the prisoners. It is true, that when the evidence of the surgeons, given on the first trial, was read and was repeated by them on the second, " the prisoners," as observed by the learned Counsel, " had no chance of success ; " but this was because the facts afforded no ground out of which such chance could justly arise.

On the whole, therefore, I think that the construction contended for by the prisoners' Counsel not being accordant with the object of the statute, nor justified by the language of the statute, nor founded on any intelligible principle, ought not to prevail. It would lead to the consequences of enabling a prosecutor or his counsel to deepen the responsibility of an offender, whose offence might be the most trivial, by the form of the indictment and the course of evidence, so that a man indicted for murder, against whom, in the course of the proceeding, an assault committed by him long before the death might be relevantly proved, might be acquitted of the murder

on proof that it was committed by another ; *and in addition to the calamity of being tried for a capital crime of which he is guiltless, be liable, by reason of that calamity, to be visited with solitary imprisonment and hard labour. It is true that the discretion which on such conviction belongs to the Court, is not likely to be abused, and it is also true that it may sometimes be extremely convenient that such discretion should exist as in the present case, where, on failure of the greater charge an immediate punishment of proved criminality is expedient for the ends of justice. But believing that the Legislature never intended to invest the Court with such a discretion in such a case,—considering that the rule of law now to be defined and maintained may apply to cases entirely dissimilar in moral character to the present, and in which a discretion, extended by mere accident, may work liabilities which the law never contemplated, I adhere to the opinion which, on imperfect materials, I formed at the trial. Lamentable as it will be if the prisoners shall obtain impunity by the success of opposite positions, averting a conviction of assault on the first trial, by successfully contending that it could not take place, on the very ground that the assaults proved did not conduce to the death charged, and succeeding afterwards by arguing that they might have been so convicted, they must, if they are now right, have the benefit of the error. But I think the prisoners' Counsel were right in their contention on the first trial, and if so, the present conviction is right.

V. WILLIAMS J.—In this case the prisoners in substance allege by their plea, which they were put to prove by the replication, that they were legally acquitted, on a former indictment, of the assaults charged against

*152] them by the present indictment. *And as it is plain that they could not have been legally acquitted of the assaults unless they were in peril of being legally convicted of them, the question resolves itself into the inquiry whether, on the former trial, the prisoners could have been legally convicted of all the assaults charged by the present indictment, and I am of opinion that they could not.

It cannot be doubted that this question depends altogether on the operation of stat. 7 *Wm.* 4 & 1 *Vict.* c. 85, s. 11. Before that statute, although the general rule was that it was not necessary to prove the crime charged by an indictment to the whole extent laid, it being sufficient for the prosecutor to prove so much of the charge as constituted an offence punishable by law, yet this rule was undoubtedly subject to the qualification, that if a prisoner were indicted for a felony, he could not be convicted of a misdemeanor on that indictment.

But by the statute in question it is enacted, that "on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding." The language here employed appears to me to shew that the statute did not intend that the person charged with a felony including an assault, should be regarded, in any event, as charged with the offence of assault in addition to the crime of felony imputed by the indictment, but meant only that the portion of the crime of the imputed felony which consists of the offence of assault, shall *per se* be a subject of conviction and punishment, if it be proved that the prisoner is guilty of that portion and of that portion only.

If, then, it shall be proved that some person has been guilty of the whole of the imputed felony, including *therein necessarily the imputed assault, but the [*153 evidence fails to implicate the prisoner in any portion of that guilt, he must in my judgment be wholly acquitted.

The felony charged by the former indictment in the present case was homicide by violence to the person of *Mary Ann Parsons*. The crime charged, therefore, included an assault. It was proved that her death had been caused exclusively by a blow on the head inflicted shortly before her death, but there was no evidence to shew that that blow had been struck by either of the prisoners. It was, therefore, proved that the assault and every other portion of the imputed homicide had been committed by some person unknown, but the prisoners were not implicated in any part of the guilt. It seems, therefore, to me that they could not be convicted of any part of it, and were entitled to a general acquittal.

But it is said that this view of the case is at variance with the decision of all the Judges in *R. v. Birch*, 1 Den. C. C. 185. In that case the prisoner was indicted for feloniously assaulting one *Charles Darley*, putting him in bodily fear, and feloniously and violently stealing from his person a watch and other property. The prosecutor did not appear, and the proof as to the felony failed. But it was proved, that on the night in question the prisoner struck the prosecutor several times about the head while he was lying on the ground. The jury found the prisoner guilty of an assault only, not being satisfied that it was with intent to rob. And it was held by eleven Judges, on a case reserved, that the conviction for the assault was right under stat. 7 Wm. 4 & 1 Vict. c. 85, s. 11. But it must be observed, that in this case it was not proved that any one had been guilty of the

*154] imputed robbery. The Crown failed altogether to *prove either an assault with intent to rob, or stealing from the person of the prosecutor, and established only one portion of the crime of robbery, *viz.* that which consisted of the assault *simpliciter*, and of that portion the prisoner was guilty. It does not follow from this decision, that if it had been proved that some one unknown had been guilty of the felony charged, and the assault included therein (but that the prisoner was not at all implicated in any part of this guilt), the Judges would have held a conviction for assault to be warranted by the statute. In truth, they could hardly have so held, without overruling the decision of *R. v. Phelps*, 2 Moo. C. C. 240, which they do not at all appear to have intended to do.

In that case the prisoner was indicted, with others, for the murder of *John Overbury*. It was proved at the trial, that in a scuffle the prisoner struck *Overbury* once or twice, and knocked him down. The prisoner afterwards went home, and took no further part in the affray; and shortly afterwards *Overbury* was again assaulted and killed by some other persons who could not be identified, and there was no distinct evidence to connect the second assault with the prior assault by the prisoner. The jury acquitted him of the felony, but found him guilty of an assault. The Judges however, in a case reserved, thought that the conviction was wrong.

But it has been argued that this view of the case is at all events at variance with the definition given by the Judges, in *R. v. Birch*, of the requisites of an assault for which a conviction may take place under the statute, inasmuch as the Judges, in effect, resolved in that case, that it is only requisite that the assault shall be included in the charge on the face of the indictment, and also "be a part of the very act or transaction which the Crown

prosecutes as a felony *by the indictment." And it is said that in the present case the act or [*155 transaction which the Crown prosecuted as a felony on the former indictment must, on the facts stated in the case reserved, be regarded as having consisted of the homicide of *Mary Ann Parsons* by means of the very assaults which are charged by the latter indictment.

But why must the Crown be thus regarded as having "prosecuted" these assaults? The Counsel for the Crown it is true, stated them in his opening address as conducing to the death; adding, that if he should fail in proving that they conduced to the death, they would furnish evidence of the *animus* of the prisoners. And the evidence afterwards given on behalf of the Crown undoubtedly included evidence of these assaults. But these circumstances fail altogether, in my judgment, to establish that the assaults in question were "part of the very act or transaction which the Crown prosecuted as a felony." That act or transaction was, I conceive, the homicide of *Mary Ann Parsons*, including, necessarily, the violence which caused her death, whatever it might be. And, in my opinion, as soon as it appeared by the evidence that a homicide had taken place, the assault which caused the death, and no other assault, became necessarily, from the mere nature of the prosecution, identified as the assault which the Crown was prosecuting as part of, and included in, that felony. If there had been any evidence that the prisoners were guilty of that assault, surely the case must have been left for the consideration of the jury, exclusively of the other assaults. For if the jury were directed, first, to consider whether the prisoners were guilty of the assault which caused the death, and, consequently, of the felony, and secondly, in case they the jury acquitted of the felony, to consider whether the *prisoners had [*156 been guilty of the assaults which did not conduce

to the death, this would in effect be treating the prosecution as if it were an indictment for assault, and also for a felony including an assault, which, both by *R. v. Phelps*, and the resolution in *R. v. Birch*, is demonstrated to be wrong. The same difficulty would occur if there had been evidence to implicate one only of the prisoners in the mortal assault. Could the jury in such a case have been properly directed to have considered the Crown as prosecuting the mortal assault, as against one of the prisoners, and the assaults which did not conduce to the death as against the other prisoner?

In the present instance, it is true, the case was stopped, and no case at all left to the jury. But this makes no difference in my opinion, for whether a jury acquit in accordance with the view taken by the Judge, because there is no evidence against the prisoner, or because the evidence is not satisfactory, in either case they, in truth, acquit for want of sufficient evidence to convict.

It is manifestly fallacious to make the opening of Counsel the test on the question of what is "the act or transaction which the Crown prosecutes." It is plain that the Court is not at all bound by the statements made by the Counsel in his address. Suppose, in the present case, the Counsel had stated that the last blow was the mortal one, and he should only give the preceding blows in evidence as proof of the *animus* of the prisoners, and it had turned out, on the evidence, that one of the preceding blows was the mortal one, and the last one had not at all conduced to the death. Could the prisoners have claimed an acquittal of the felony, notwithstanding it were proved that they had inflicted the mortal blow?

Again, suppose the Counsel in his opening had
 *157] omitted in his statement, that the assaults now in question conduced to the death, and had merely men-

tioned them as proof of the *animus* of the prisoners, then by the application of this test (though the evidence would have been exactly the same) these assaults could not have formed a part of the "act and transaction which the Crown prosecuted," and the prisoners could not have been convicted of them.

The test can hardly be a sound one which thus makes the liability of a prisoner to more severe punishment depend on the inadvertence or discretion of Counsel, or the accident whether the evidence for the Crown is or not prefaced by an address from an advocate.

The material point of time is, I think, at the close of the evidence, when the Judge has to perform the duty of telling the jury as to what part of the indictment there is a case for their consideration. At that point of time, at the trial of the former indictment in the present case, it had been proved, by the evidence for the Crown, that the homicide imputed by the indictment, including an assault, had been committed. In my opinion, this demonstrated, *per se*, that the act or transaction which the Crown was prosecuting, was the homicide which thus appeared to have been committed; consequently, I think the prisoners could not have been legally convicted under the statute of any assault which was not included in that transaction,—in other words, which did not conduce to the death.

I may add, that it seems to be impossible to come to a different conclusion without overruling *R. v. Phelps*; for overruling which case I have found no good reason.

The question remains, whether the conviction on the present indictment was wrong, by reason of the mode in which the case was left to the jury. I incline to think, that the summing up was not strictly correct; *for, notwithstanding that the assaults did not in any way conduce to the death of the deceased, the prisoners

might have been in jeopardy of being convicted of them on the former indictment, but for the proof that some one unknown had committed the homicide charged against the prisoners, which demonstrated that these assaults were not any part of the transaction which the Crown was prosecuting.

The question, therefore, which was submitted to the jury was not conclusive of the issue. It would have been so if the ruling in *R. v. Crumpton*, C. & M. 597, (which the learned Judge appears to have followed), were law. But I consider that case to have been in effect overruled by *R. v. Birch*.

Still, I am of opinion that the conviction was right. I think the learned Judge correctly laid down that the burthen of proof lay on the prisoners who were to establish the truth of their plea. Now, this could only be done by proving that they were in jeopardy, on the former indictment, of being convicted of all the assaults included in the latter. But the evidence adduced (as it is stated in the case reserved), shewed, according to the view I have taken of the operation of the statute, that they were not in such jeopardy. I think, therefore, that they failed in proof of their plea, and that they were properly convicted.

ERLE J.—In this case the question turns upon the construction of the stat. 7 Wm. 4 & 1 Vict. c. 85, s. 11. The words of that statute indicate that the assault in the conviction should be the assault included in the supposed felony, and the cases decide that a conviction for an assault, unless included in the felony in law and connected therewith in fact, would be wrong.

*159] *Thus, upon a charge of felony in attempting to discharge a loaded pistol, an assault by blows

not involved in or connected with the presentation of the pistol, was held not to be included by law in the charge; *R. v. St. George*, 9 C. & P. 483. So where an indictment for a burglary with an intent to ravish, contained a charge of an assault by blows, this assault was held not to be included by law in such a case of burglary; *R. v. Watkins*, C. & M. 264. So were, upon a charge of rape, it was proved that prisoner assaulted at one time, and that another man ravished at another time, the assault by the prisoner at a different time was held not to be connected in fact with the crime charged; *R. v. Guttridge*, 9 C. & P. 471. So, upon a charge of murder, an assault at a different time from that when the fatal blow was given, was held not to be connected in fact with the charge; *R. v. Phelps and Others*, 1 Russell, 781. Also where, upon the same charge of murder, there was some evidence that the prisoners were co-operating in the beating that caused the death, it was left to the jury to say in effect whether the acts of the prisoners had conduced to the death. If yes, the prisoners were guilty of felony. If not, they were not guilty, altogether, the evidence of the assault being equally evidence to prove the felony. (*R. v. Phelps, Southan and Smith*, C. & M. 180).

According to these decisions, the summing up of the learned Judge now under consideration was correct, and his construction of the statute does not conflict with the principle which the Judges laid down in the case of *R. v. Birch*, 1 Den. C. C. 185, with reference to the facts then before them, *viz.*, that the assault intended by the statute must be included in the indictment, and must be part of the transaction which is prosecuted as a felony.

*In that case there was evidence of the prosecutor having been assaulted and robbed, and of the prisoner having taken part in the transaction when

[*160

the assault and supposed robbery occurred. But the proof of the robbery was in the opinion of the jury imperfect. Under these circumstances a conviction for an assault, which upon the evidence might have been a part of the felony charged, was supported.

In the present case the cause of death being proved, and the assaults by the prisoner, which were in evidence, being also proved to be no part of the cause of death, and the cause of death being the transaction which is prosecuted as a felony—it seems to me that the assaults cannot be truly said to have been part of the transaction which is so prosecuted.

The intention of the prosecutor to include them in the indictment, is not alone sufficient to support a conviction, because that intention existed in the cases where the convictions were excluded.

It is further to be observed, that there is a distinction between the charge of assault in cases of rape, robbery, and felonious wounding, and that in cases of homicide by assaults. In the first class, the charge relates to one transaction, which is probably a felony, and the assault in question is a part of that transaction, and has its felonious character at the time of its committal. In the second class, on a charge of homicide by assault, the essence of the crime is causing death; the felonious nature of the assault arises from the retrospective effect of death; and in many cases of homicide the felony is equally complete, whether death was within the intention of the prisoner at the time of the assault or not: if the assaults and death stand in the relation of cause and effect, the felony is proved; if they do not, the assaults are unconnected *with the felony charged, and are no
*161] ground for a conviction under the statute.

According to this reasoning, the statute would not come into operation in cases of homicide by assault, and

I believe, it was not intended that it should ; but if, after the decisions, this reasoning is not adopted to the full extent, still the interests of public justice, seem to me to require that the application of the statute should be restricted to those cases only of homicide where the subject of prosecution is one transaction, and where the death is attributed to a single occasion of assault, so as to be within the principle laid down in *R. v. Birch*.

It is important for public justice to conduct trials for murder with unity of attention, to free the Judge from the technicality in which we are now involved, and the jury from referring the evidence to three alternatives, murder, assault, and acquittal; but it is imperative to release a prisoner on such a trial from liability for various assaults. If he is liable to be convicted of course he should have full notice and opportunity for defence. The death may be attributed in various counts to various assaults, sometimes single, sometimes in a series. If the prosecutor is found to be mistaken in supposing the assaults conduced to the death, and the prisoner is to be acquitted of felony, it is contended, that he must then be convicted of all the assaults which have been proved; but the Legislature cannot have intended that the mistake of the prosecutor should justify an unfair trial; and the trial would not appear to me to be fair if the prisoner, when defending himself for murder, is also called on for a contingent defence against charges for several alleged assaults in the course of several weeks, some of which may be open to contradiction, others to justification, and others to mitigation.

*The purpose of the statute was to prevent the delay and trouble of a second indictment for [*162 assault. In cases of homicide by several assaults that saving would be effected by a sacrifice of justice, and the construction of the statute is to be adopted which most

avoids this inconvenience. The learned Judge adopted the construction of the statute which gives it this restricted application, and his summing up is objected to on that account; but upon the grounds above stated the objection, in my judgment, fails, and the summing up ought to be sustained.

CRESSWELL J.—The question now to be determined arises out of the enactment in 7 *Wm.* 4 & 1 *Vict.* c. 85, s. 11. “That on the trial of any person for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person so indicted, if the evidence shall warrant such finding.” The crime charged means the felony charged, and that must be of such a nature, that it cannot be committed without an assault. If the crime charged does not necessarily include an assault, I conceive that the case cannot be brought within this section, by any express averment that an assault was committed. If the question were a new one, and I had been called upon to construe the enactment, without reference to decided cases, I should probably have been of opinion that it was intended to apply to those cases only, where an attempt had been made to commit a felony, which had not been perfected, and in making the attempt an assault had been committed. But it has been held, that *163] the statute ought not to have so *limited a construction; and that a party indicted for robbery may be acquitted of that felony and found guilty of assault, although the jury negative any intention or attempt to rob. On the other hand, it has been held, that the enactment ought not to have the widest application, of which the words used are capable, but that the

assault, to come within it, must be included in the charge on the face of the indictment, and also be part of the very act or transactions, which the Crown prosecutes as a felony by the indictment.

Those two points were ruled by the unanimous opinion of the Judges in *R. v. Birch and Another*, 1 Den. C. C. 185. That case having been so decided, it is in my judgment much better to abide by it, whatever doubts I may entertain as to the construction of the statute, than to render the criminal law uncertain, by re-opening a question which has been decided by the whole body of Judges. If the decision of the whole body pronounced one year, may be overturned the next—that reversal may again be reversed the following year—and such a course of proceeding would bring the whole criminal law into a state greatly to be deplored. I therefore abide by the decision in *R. v. Birch and Another*, and hold that the assault of which a party may be convicted under the 7 Wm. 4 & 1 Vict. c. 85, s. 11, must be part of the very act or transaction which the Crown prosecutes as a felony, but that it need not be committed in attempting to commit the felony charged.

The matter to be determined in the present case then is, whether the assaults for which the *Birds* were indicted and tried before the learned Judge who has reserved this case for consideration, were part of that act or transaction which the Crown prosecuted as a felony before my Brother TALFOURD, on a former *occasion. If they [*164 were part of that transaction, the prisoners might have been before convicted, and they cannot be tried a second time for the same offence, otherwise the present conviction is right.

On this part of the case also, I have a decision of the whole body of Judges to guide me, for I cannot distinguish *R. v. Phelps*, 2 Moo. C. C. 240, reported also in 1

Russ., by Mr. *Greaves*, from the present. In that case *Phelps* was indicted together with two others, *Southam* and *Smith*, for the murder of *Overbury*, by blows. Evidence was given that *Phelps* had struck the deceased more than once and knocked him down; but other evidence shewed that those strokes were not the cause of death, and that *Phelps* had gone away a quarter of an hour or more before the blow was given, to which the death of the deceased was ascribed. The late Mr. Justice COLTMAN told the jury that there was no evidence to support the charge of murder against *Phelps*, but that they might find him guilty of assault, which they accordingly did. The case was left to the jury on the charge of murder—as to the other two prisoners, and they were altogether acquitted. The propriety of the conviction of *Phelps* was reserved for the opinion of the Judges, who held, that as the assault proved did not form a constituent part of the greater charge of felony, but was a distinct and separate assault, the conviction was wrong. They therefore decided, that the assault so committed by *Phelps*, was not part of the act or transaction which the Crown prosecuted as a felony by that indictment.

Here the *Birds* were shewn to have committed various assaults, but the evidence negatived their being the cause of the death of *Mary Ann Parsons*, which was ascribed to a blow inflicted at a subsequent time, and the party
 *165] who inflicted it could not be ascertained, *where-
 upon the learned Judge told the jury, and in my opinion rightly, that there was no evidence to establish the charge of murder against the prisoners,—and the evidence then given shewed that the assaults proved to have been committed by the *Birds*, were not part of the act or transaction prosecuted in that case. Feeling, therefore, that the case of *R. v. Phelps* cannot be distinguished from the present, and that it was decided by the

whole body of Judges, for the reason given above, I should think it right to act upon it as a binding authority, even if I doubted the propriety of the decision, that it seems to me to be correct.

The act or transaction which the Crown prosecuted by the indictment for murder preferred against the *Birds*, was the act of killing *Mary Ann Parsons* of malice aforethought by blows. The indictment did not ascertain and describe the particular blows by which the death was occasioned, and it was competent to the Crown to give evidence of any blows given by the prisoners, and to endeavour to shew that they were the cause of death. But still, the transaction prosecuted was the death, and the means by which it was occasioned; and when the evidence shewed that the death was occasioned by a particular blow—and that the others before proved were not part of the same transaction, but wholly distinct and independent of it, the Judge who tried the prisoners was bound to withdraw them from the consideration of the jury on the charge of murder, and as in *R. v. Phelps*, a conviction of those assaults would have been wrong.

Nor can I discover that this view of the subject is inconsistent with *R. v. Birch*, and other cases, where it has been held, that although the evidence fails to shew that the supposed felony prosecuted by the indictment has been committed at all, nevertheless *the party charged may be convicted of an assault, for it may [*166 still be ascertained by evidence what is the transaction really prosecuted, *exempli gratiâ*, indictment for rape, evidence—assault, indecent liberties, an apparent attempt to commit the crime charged, but no completion of it. The transaction is ascertained, and an assault being part of it, comes within the 7 Wm. 4 & 1 Vict. c. 85, s. 11. So in the case of an indictment for robbery, as in *R. v. Birch*, if there were evidence of one assault, and nothing more,

that would appear to be the transaction prosecuted ; but assume the evidence to be of an assault, and afterwards another and independent assault, and on this latter occasion money lost, the latter would appear to be the real transaction prosecuted, and the party, if acquitted of the latter transaction, could not be found guilty of the first and independent assault. I think, therefore, that upon principle and authority, I am bound to say that the present conviction is right.

WIGHTMAN J.—The question in this case in substance is, whether the prisoners upon their trial, before my Brother TALFOURD, upon the indictment which charged them with murder, could have been found guilty under the 11th sect. of the 7 Wm. 4 & 1 Vict. c. 85, of any of the assaults charged against them, and to which they have pleaded *autrefois acquit*.

The words of the statute are, “and be it enacted, that on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and *167] to find a verdict of guilty of *assault against the person indicted, if the evidence shall warrant such finding.”

It is perfectly clear, that this clause was not intended to apply to every assault that might be proved against the prisoner upon a trial for a felony including an assault, though totally unconnected in time, place, or circumstance, with the felony charged, and from the time of the passing of the act, its application has come into question in a great many cases, and there are dicta and decisions of individual Judges not easy, and it may be impossible to reconcile ; but, I do not think it necessary or expedient to refer to more than four, two of which have come

under the consideration of *all* the Judges, and two others, which though only expressing the opinion of individual Judges, agree so exactly, as it appears to me, in principle, as to the instances in which the power of the statute may be applied, with the two cases before all the Judges, that I cite them as additional authorities for the conclusion at which I have arrived in the present case.

The cases to which I refer are, *R. v. Phelps*, 2 Moo. C. C. 240; *R. v. Birch*, 1 Den. C. C. 186; *R. v. St. George*, 9 C. & P. 483, and *R. v. Crumpton*, C. & M. 600.

These cases differing in some respects in circumstances, all agree in the principle upon which the statute is applicable, 'that the prisoner can only be found guilty under the act of Parliament of an assault, which was involved in and formed a part of the act or transaction which was charged as a felony in the indictment.'

This is stated in terms by my Brother PARKE, in *R. v. St. George*, in which he refers to the former case of *R. v. Gutteridge*, to the same effect, and is the opinion of my Brother PATTESON, in *R. v. Crumpton*, *and is [*168 that of all the Judges in *R. v. Birch* and *R. v. Phelps*.

Assuming then, that the principle, upon which the question, whether a prisoner charged with a felony including an assault, can, if acquitted of the felony be convicted of an assault, is settled by the cases to which I have referred, it only remains to apply that principle to the present case.

The prisoners were charged upon the first indictment with the murder of *Mary Ann Parsons*, by beating, striking, and kicking her at different times, as stated in the indictment.

The act or transaction, charged as a *felony*, was an assaulting and beating, which caused the death of *Mary Ann Parsons*. The death was proved by the prosecutors

to have been wholly caused by a blow, given very shortly before the 4th of *January*, 1850; but as there was no evidence that it was inflicted by either of the prisoners, they were acquitted of the felony with which they were charged.

But it was proved, in the course of the trial, that on several days and occasions *before* the day when the fatal blow was given, the prisoners had assaulted and beaten the deceased, but those assaults were quite distinct and independent of the act or transaction which caused the death. It is true, that the felony is charged to have been committed by beating, that the deceased did die by beating, and that the prisoners were proved to have beaten her; but the assaults and beating proved against them did not form part of the act or transaction *which was charged as a felony* in the indictment, which was the assaulting and beating which actually caused the death.

The Crown prosecuted in respect of an assault and blows which caused death, and proved that at a particular *time a blow was inflicted by some one which
*169] did cause the death of the deceased; it was that blow, and that only, which caused the death, and was, in fact, as it appeared by the evidence for the Crown, the act which was charged as felonious. The prisoners were not proved to have committed that act, nor were any of the assaults and beatings proved against them, any part of the transaction which the Crown proved to be the cause of death, and were therefore not involved in, nor did they form part of the act or transaction which was charged as a felony in the indictment.

In *R. v. Birch and Others*, the prisoners were indicted for feloniously assaulting and robbing the prosecutor with violence. The evidence proved that the prosecutor was attacked by several persons and knocked down, and the prisoner was seen to strike him whilst on the ground,

with other persons about him also misusing him, but by reason of the absence of the prosecutor, the charge of felony was not supported; but the prisoner was convicted of an assault under the statute, and it was held—rightly, because the assault formed part of, and was involved in, the act or transaction which was charged as a felony in the indictment. It was clear that it was *then* that the felony charged in the indictment was committed, if at all, and the assault formed part of that transaction, and was involved in it. The distinction between that and the present case appears to me clear.

If, in the present case, it had appeared that, at the time the mortal injury was received, the prisoners were with the deceased, and had assaulted and beaten her immediately before, but that the evidence raised a doubt, whether the mortal injury was occasioned by blows, or by a fall which might be attributed to accident, and on that ground the jury had acquitted the *prisoners of felony, I should think that they might be con- [*170
victed of assault under the statute, for in that case the assault proved would have been involved in, and formed part of, the act or transaction charged as a felony in the indictment, and prosecuted as such, and though the evidence failed to establish it as a felony, it was the only transaction which was intended as felonious. If that was not felonious there was no other.

But the assaults in question were wholly unconnected with, and independent of, the transaction, which was proved on the part of the prosecution to have caused the death of the deceased, and which was the felony charged against the prisoners, and of which they might have been found guilty, if they could have been proved to have been actors in it.

I may observe, that the issue taken by the replication to the plea of *autrefois acquit* is, "that the prisoners were

not upon the previous trial acquitted of the felony and murder, including the same identical assaults charged in the second indictment;" and for the reasons I have given, it appears to me, that the felony and murder, charged in the first indictment, did not include the same identical assaults charged in the second indictment. The learned Commissioner, in charging the jury, told them, that if they were satisfied that there were several distinct and independent assaults, some or any of which did not in any way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown. The whole of this charge is hardly correct, as the question is not, whether the assault conduced to the death of the deceased, but whether it was part of the very act or transaction which was charged as a felony in the first indictment.

But this is not a case for a new trial, and the question
*171] *substantially is, whether, notwithstanding this defect, if it be one, the verdict is, under all the circumstances right, the charge directs the jury to the main point, whether the assaults were distinct and independent assaults, clearly meaning distinct and independent of that which was involved in, and part of, the act or transgression charged as a felony by the prosecution, and upon the great point seems to me substantially correct, and it would be too much to set aside a verdict fully warranted by the evidence, because, upon a critical examination of the Judge's charge, there may have been a partial defect; the charge upon the whole is substantially correct.

I am, therefore, of opinion that the prisoners could not, consistently with the principle which I have already stated, have been convicted upon the first indictment of those assaults which were the subject of the second

indictment, and that the verdict, which has been found for the Crown, is right.

MAULE J.—I am of opinion with my Lord Chief Justice JERVIS in this case, that the prisoners were entitled to an acquittal. The prisoners, who were indicted for an assault, having pleaded that the assault was comprehended in the indictment for murder, which was denied, the question which we are now called upon to determine arose. It seems to me, upon the evidence, and indeed upon what is not at all disputed by anybody, that the assaults charged upon the second indictment were assaults comprehended in the felonious violence charged upon the former occasion.

Now, the prisoners upon the former occasion were indicted for murdering *Mary Ann Parsons* by beating. There were a considerable number of counts, stating *various assaults, and stating as the result of [*172 them, that the girl was murdered. Upon the second occasion no doubt was raised at all that the assaults for which it was intended to try the prisoners, were the very same assaults that had been given in evidence upon the former occasion, and which were comprehended in some of the counts of the indictment upon that occasion.

The crime charged is, I think, to be determined by looking at the indictment: the indictment is the legal charge, and there the crime is charged in several counts comprehending assaults, comprehending different assaults, comprehending according to concession those very assaults for which the prisoners were secondly tried. They were acquitted upon the first indictment, and they were no doubt entitled to be acquitted upon the evidence given before my learned Brother TALFOURD J., upon that trial,

and no doubt could ever have entered into the mind of anybody who knew anything about the matter, that they were entitled to be acquitted of the murder upon all those counts, and they were in fact acquitted upon all those counts, and they were acquitted of everything which could have been proved under any one of those counts. Now I cannot understand why, assuming that upon an indictment for homicide by violence, the parties charged may be convicted of an assault within the statute, putting aside the grave doubt which has been raised by two of my learned Brothers at least, whether, upon an indictment for homicide, according to the true intent of the statute you could, upon any indictment for homicide, convict of assaults; but assuming that you could (which I think we must do), then it seems to me, that upon every one of those counts in that indictment (in whatever way they were dealt with by the Counsel *173] for the prosecution upon *that occasion) the prisoners were entitled to the full benefit of the acquittal, that is, just to the same benefit of acquittal as the prisoners would have been entitled to if any of those counts had stood alone.

I cannot at all understand, upon the assumption that I have already mentioned, why you can make a distinction between the different counts of that indictment. I do not know that any distinction is actually made. Suppose any one of them had stood alone, for the sake of simplifying the matter, suppose a count charged an assault on the 3rd of *November*, which was said to have ended in the felonious death of the deceased. If that had stood alone and the evidence had been given which was given in respect of the death, and the jury had been of opinion that death had been produced by that assault, they might have convicted under that one count of murder or manslaughter. It is clear, therefore, that an assault is com-

prehended in that count, and they might also, upon the supposition which I have adverted to, have been convicted of an assault under that—and if the jury might have convicted the prisoners of any of the assaults, they must be taken, I think, to have acquitted the prisoners of the whole.

There may be some inconvenience arising from whatever construction is put upon this act, and that the point itself is doubtful, I think is demonstrated by the fact, that there are so many of the learned Judges entertaining an opinion contrary to that which I entertain myself—otherwise, I certainly should have thought that it was a clear point enough.

Upon the former occasion the indictment stated in general terms indeed, but in terms which it is not at all questioned were intended to comprehend and did comprehend the particular transactions given in evidence on the part of the prosecution at the trial—*the indictment charged those very things in several [*174 counts, and those very things in those counts were before the jury, and whether it was assault, or whether it was felony, I cannot see any ground for the reasoning that has been urged, that where there has been no felony you cannot convict of assault—that is contrary to every day's practice. It seems to me, therefore, that upon the former indictment it was quite competent for a conviction of assault to have taken place, and that therefore the parties were tried a second time for the same offence.

The acquittal upon the former occasion seems to have taken place very much by the consent of all parties. The case seems to have failed as to the murder, and therefore after that was decided, a conviction of assault was not pressed—and, indeed, it is not very usual, in cases of indictment for murder, to press for a conviction of assault—it is very seldom indeed that I have known it pressed

for, which is perhaps an argument in favour of the convenience of the interpretation, which some of my learned Brethren have suggested, and which would have been the true one, if we were not bound by contrary decision.

I think that the prisoners had been formerly tried and acquitted of that of which they have been convicted upon the second occasion, and therefore that the conviction is bad.

COLERIDGE J.—I have considered this case with all the attention which the known conflict of opinions upon it among the Judges, made it proper for me to bestow, and although I cannot say that I have arrived at a conclusion free from all doubt, yet upon the whole, I think that the conviction was right.

*175] *The question depends on the true construction to be put upon the words of the statute—that “at the trial of any person for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding.” These words are very general, and yet as justice requires, so I think from the very words, if closely examined, some limitations will be found clearly implied upon their generality—and these it will be right to point out.

First, I remark the change of language from “felony” to “crime charged,”—the first points to the species, the second to the individual case, and that case must be “charged,” *i. e.* expanded in statement on the indictment. The statute, therefore, applies only where the individual crime, being a felony in itself involving an assault, shall, as it is charged on the face of the indict-

ment, include an assault on the person—and the whole charge will be compounded of the assault, and all those circumstances, whether of act, intent, or consequences which go to make the felony complete—these with the former altogether making one whole.

The statute then proceeds to say, that in such case the jury may “acquit of the felony” and find a verdict of “guilty of assault;” whether this means that they may first acquit of the whole charge as preferred, and then looking at the facts composing it, select one, and find the prisoner guilty of the assault as a new charge, or only, that they may acquit of the felonious part of the charge, and convict of the assault which formed the other part, is immaterial; for in either way, the assault of which they find guilty must clearly have been that which was involved in, and made part *of the one entire crime charged on the face of the indictment. No one [*176 reading the section, and at all accustomed to the rules of legal interpretation, would suppose that any independent assault, though receivable in evidence, it may be, as conducing to the proof of the prisoners’ guilt, could be made the subject of the verdict; that would be to convict the prisoner of an offence with which he had never been charged, against which he had never in fact defended himself, and which he could not be supposed prepared to do.

Thus far seems clear. But a further question is raised upon the words “acquit of the felony.” An acquittal may take place where one prisoner only is charged, either because the proof fails to shew that any felonious act has been committed, or because the act appearing to be felonious is not brought home to the prisoner, and where more than one prisoner is charged, also, because he is not proved to have taken part in the act, which, as to all or some of those charged with him, is found to be

felonious. The statute does not in terms regard those distinctions; nor do I think it material to follow them out, because, if they at all affect the application of the statute, *i. e.* if the statute does not apply to all cases of acquittal, but only to some, it will be found, I am convinced, if the inquiry be fully followed out, to depend on this; whether on the given ground of acquittal the assault could, or could not, be part of the whole crime charged as felonious. It seems to me too, I own, that to make this directly the test of the applicability of the statute, leads to a more technical, or if it be thought a fitter expression, a more strictly scientific rule of construction, than is proper for the occasion, for I conceive it clear that the statute was framed to meet a commonly occurring evil of the entire escape from punishment *177] of *one, who was clearly guilty of a part of the charge, because he was not found guilty of the whole, and that, in framing their remedy for this, the framers were not careful to observe the precise conditions of the existing criminal law. Indeed the remedy is founded on an avowed innovation upon it. Whether this might have been avoided, or had better have been avoided, is not the question; our duty is to interpret the statute as we find it, and bearing this in mind, in order the better to fulfil its intents.

But recurring to that which I consider the true and the more expedient test, whether, in any given case, a party acquitted of felony may be found guilty of assault, the test, namely, whether the assault of which it is proposed to find him guilty, formed part of the whole crime charged as felonious, the question still arises—How are you practically to ascertain that? And here I think it most convenient to introduce the case of *R. v. Birch and Hardy*, 1 Den. C. C. 185; because the resolution in that case brings us down to that point in the inquiry at which I

have now arrived. "The Judges there are reported," according to the manuscript note of my Brother PARKE, "to have thought that the enactment was not to be confined to cases where the prisoner committed an assault, in the prosecution of an attempt to commit a felony—nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. But they were of opinion, that in order to convict of an assault under the section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction which the Crown prosecutes as a felony by the indictment."

The rule here laid down is the same to which a mere consideration of the words of the statute, unaided by any decisions, would have brought me. But then [*178
*arises the question; how in any given case it is to be ascertained whether the assault on which the verdict is to be allowed to pass was "included in the charge and on the face of the indictment," and also whether it be "part of the very act or transaction, which the Crown prosecutes as a felony by the indictment." The generality of the language of our indictments makes it impossible to determine the first question merely by looking to the face of the instrument; we can learn no more from that than whether *any* assault is charged or not; what assault, when, where, or how committed, all particulars in short from which identification of charge and proof as to specific assaults could be made out, are left entirely unascertained by that; a state of things, at first sight, difficult to reconcile with the theory of pleading, with however little inconvenience it may be found to work in practice.

Again, it would not be right to let the determination of the second question depend upon the opening speech of the Counsel for the Crown, nor on the course he may

pursue in conducting his case; often there is no opening speech, often no Counsel for the Crown. But assuming there were both in all cases, it could not be left to the counsel merely by stating the assault in the opening, or offering evidence of it in the course of his proof, to make the prisoner liable to a verdict for it, unless the circumstances were such as really brought it within the scope of the statute.

It seems to me, however, I own, that there is more seeming than real difficulty in a practical application of the rule, as it is laid down in *R. v. Birch*. In the first place, the indictment must be supposed to have alleged an assault or assaults (it is immaterial which), and one or more must be supposed to have been given in evidence.

*179] It must be supposed, too, that when the evidence is closed, the Judge, by the light that it affords, will have been enabled to see what act or transaction it is which it has been intended to prosecute as a felony by the indictment (for that which he has in fact attempted to substantiate, the Counsel must be taken to have intended to prosecute), and with that knowledge how shall the Judge have any difficulty in seeing whether there is any evidence to connect the assault or assaults proved, with the felonious act or transaction which it has been sought to prove? It is the province of the Judge, on all trials, to determine whether there is any evidence to prove an issue, and the connection, I now speak of, is in the nature of an issue. If there be evidence, the questions for the jury will be, do they believe it? and also the fact of the assault: and if they believe both, the prisoner will be found guilty under the statute. Of course, what the nature and extent of the connection must be to satisfy the statute, what the evidence, whether time, place, intent, or other circumstance to make it out, the Judge would have to point out to the

jury. If there be, in the Judge's opinion, no such evidence, this matter could never go to the jury.

Every case of this kind supposes an acquittal of the prisoner of the felony charged; but it has been thought that distinctions may arise according to the ground of acquittal. Now this may be, either because the jury think no felonious act has been committed at all,—as that, in case of murder, the deceased has died from natural causes, or in robbery, that no money or chattel has been taken from the prosecutor,—or because they think the felonious act is shewn to have been committed by some third party, with whom the prisoner is not so connected as to be a felonious accomplice, or because, simply, they think the act, or *the felonious inten- [*180
tion, not satisfactorily brought home to the prisoner. But in all these cases equally the *prisoner* is disconnected with the felonious charges. The acquittal, in all, is simply that he is not guilty. A felony, supposed to be committed by another, or not proved as to him, is, as to him, and as to the charge in hand, as much no felony, as if none had ever existed at all; and, therefore, in all these cases, the supposed assault is equally disconnected with the felony—it can form no part of that which, by the assumption, does not exist at all. But it is obvious, that this cannot prevent that sort of connection which the statute requires, because, if it did, the statute, which applies only in the cases of acquittal, could have no operation at all. The ground of acquittal may indeed often, in individual cases, shew that the statute cannot be resorted to; but it will not, I conceive, ever make the application of the rule, according to the course I have sketched out, impracticable.

I have forborne in these remarks from citing cases, with the exception of that of *R. v. Birch*, on which I have dwelt for the obvious reason that it was one decided

by the assembled Judges, in which it was attempted to lay down a rule for future guidance. I have considered myself bound by that case, and my only object has been to understand and apply it. Decisions of single Judges, with all the sincere respect I feel for those who have pronounced them, I think are not entitled to much consideration, where, as in the present case, we are trying the rule laid down by the body, and seeking to illustrate and apply it.

There is, I think, but one other case decided by the Judges upon the section, and this so remarkably like the present, that I am unable to find any substantial difference between the two. I mean the case of *R. v. Phelps and two Others*, 2 Moo. C. C. 240, and *181] *C. & M. 180. Like this, that was a charge of murder against more than one person, all charged as principals in one count, and the death alleged to have been occasioned by striking and beating. All were acquitted of the felony,—there was evidence against two that they were present at, and took part in, the violence which occasioned the death, but *Phelps*, who had struck the deceased several blows, had gone away from fifteen to thirty minutes before the violence was committed. The learned Judge who tried the case seems, from the report in *Carrington and Marshman*, rather to have assumed, that if this evidence against *Phelps* were believed, he might be found guilty of assault; and he was so convicted. But the Judges were unanimously of opinion that the conviction was wrong,—they assumed, in fact, that it was a distinct and separate assault, and they laid down in substance the same rule as that afterwards propounded in *R. v. Birch*, viz., that to bring a case within the statute, “the assault must be such as forms one constituent part of the greater charge of felony.” Neither report is full enough to enable one to

say whether there was any evidence to connect *Phelps's* assault with the fatal and felonious violence of other persons, such as to make it part thereof without making him guilty of the felony—if there were, the result only would have been different, but the rule the same. Even if I thought this case wrongly decided, I should not feel that we were at liberty, divided as we are in opinion, to overrule it; uniformity of decision, if it be important in any Court, or in any branch of the law, is above all important in this Central Court of Criminal Appeal and in this branch of our law. But it is a great satisfaction to me, after much doubt and fluctuation of opinion, that I can concur with it entirely, and have the benefit of its authority.

*My judgment is already so much longer than [182 I could have wished, that I will not prolong it, either by applying what I have said at any length to the case before us, or by any consideration of the objection made to the direction of Mr. *Gurney*. In my view, the latter cannot be necessary, for it resolves itself into the main point, and in any view the former may be dispensed with after the judgments already pronounced, and where we are all so familiar with the facts and the questions we have to consider. I will only say, that the assaults given in evidence on the first trial, respecting which the present question has arisen, appear to me to have been so entirely and unquestionably severed from the felonious act or transaction of which the prisoners were acquitted, that my Brother TALFOURD was perfectly justified in not submitting them to the jury. I am, therefore, of opinion that the present conviction was right.

PATTESON J.—Two questions appear to me to arise in

this case; first, whether the prisoners could have been convicted, upon the former trial, of all the assaults charged in the present indictment, and secondly, even supposing they could not, whether the proper points were put to the jury by the learned Judge upon the present trial.

The former indictment contained several counts. In some a single assault and murder was charged; in others a series of assaults on different days, causing together the death of the deceased, and constituting the crime of murder. It is plain that one felony only is charged from the nature of the crime—murder of one individual; it is impossible that the counts could be treated as charging *183] separate felonies, and the Judge *could not be called upon to put the prosecutor to his election.

By the evidence it appeared, that the death arose exclusively from one assault and wound, shortly before the death, and that all the other assaults were unconnected with the death. But the infliction of that assault and wound was not brought home to either of the prisoners, consequently they were entitled to be acquitted of the murder, and of the assault which really caused the death. But several assaults were proved against them, prior to that which caused the death, though unconnected with it, and whether they might have been convicted of those assaults is the question.

The stat. 7 Wm. 4 & 1 Vict. c. 85, s. 11, provides, that “on the trial of any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person indicted, if the evidence shall warrant such finding.” I do not think that this clause is to be confined to such crimes as necessarily include an assault, as

rape, robbery, wounding with intent to murder, and such like. If it were so confined, murder and manslaughter would not be within it; for they may be committed without an assault, as by poisoning or negligence. I am satisfied, that the clause extends to those crimes which, in their nature, may or may not include an assault; but which are charged in the indictment as so doing.

The words of the clause are very general, and might, at first sight, be supposed to warrant a conviction for assault, where the proof of the felony failed, whether that assault were connected with the supposed felony or not, and at whatever time, however distinct *from the time of the supposed felony, it took place. [*184 But the manifest injustice of so construing them, has made it necessary to put some limitation upon their meaning; accordingly, many cases have occurred in which learned Judges have felt themselves bound to lay down what they considered to be the true limitation.

Those cases were cited and commented upon when the present case was argued, and I do not propose to enter into a detailed examination of them. They are, for the most part, decisions of single Judges on the circuit; entitled, certainly, to have full weight given to them, and assisting us greatly in coming to a right conclusion upon the present case, in which they are, in some measure, brought under review. They are, for the most part, cases in which the felony charged has included a single assault; and they lay down the rule, that in such cases there can be no conviction for an independent assault at a different time, because such assault can, by no reasonable construction, be treated as the assault included in the felony charged.

There are, however, two cases reported which have been brought under the consideration of the whole body

of Judges, and from them I apprehend the rule may be and ought to be taken. I allude to the cases of *R. v. Phelps and Others*, 2 Moo. C. C. 240, and *R. v. Birch*, 1 Den. C. C. 185.

In the case of *R. v. Phelps and Others*, reported also in C. & M. 180, *Phelps* and two others were indicted for murder. It turned out in evidence that *Phelps*, after having assaulted and knocked down the deceased, ran away; the deceased was afterwards assaulted and killed by some other persons, supposed to be the other prisoners; the two assaults were not connected together. The learned Judge left to the jury the question whether the other two prisoners were *guilty of manslaughter, *185] —and told them that they must acquit *Phelps* of the felony, but might find him guilty of assault. They found the other two prisoners not guilty, and *Phelps* guilty of assault. But upon reference to all the Judges, it was held unanimously that *Phelps* could not, under the circumstances, be convicted of assault. In that case, as in the present, there was an assault which caused the death, but it was not proved against any of the prisoners. There was, as in the present case, an unconnected prior assault proved against one prisoner; but it was held by the Judges not to be *the* assault included in the felony charged by the indictment. Yet in that case, as in the present, the assault committed by *Phelps* was supposed, by the framer of the indictment, to be connected with the death, and was proved by the Crown and attempted to be connected with it; and it was shewn by the evidence, which was believed by the jury, that it was disconnected with the death. The whole matter remained in doubt till the jury found their verdict, by which they acquitted all the prisoners of felony, not because they did not believe that a felony had been committed by some one, but because it was not proved against any one of

the prisoners. If they had believed the assault committed by *Phelps* to have conduced to the death, they must have found him guilty of manslaughter. The indictment alone, therefore, does not afford the test as to whether any assault that is proved is included in the felony charged, but that question depends upon the indictment coupled with the evidence. I confess I am unable to distinguish the case of *R. v. Phelps and Others* from the present case.

But it is stated that the authority of that case has been shaken by the subsequent case of *R. v. Birch and Others*, which is reported in 1 Den. C. C. 185, *and mistakenly said to have been tried before me, [*186 whereas it was tried before Mr. *Armstrong* Q. C. So far from this case shaking the authority of the former one, in my judgment it entirely confirms it. That was a charge of robbery. The prosecutor did not appear, and there was no proof of the robbery; but a witness who saw the transaction proved an assault, and the jury, not having any evidence of an intent to rob, found the prisoner guilty of a common assault. There was but one transaction proved, and there could be no doubt that it was the same transaction which was supposed to be, and for which the prisoner was indicted as a felony. Mr. *Armstrong* stated a case for the opinion of the Judges, and they held the conviction for an assault right. "The Judges thought, upon consulting all the authorities, that the enactment in the statute was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony on the face of it charged an assault. But they were of opinion, that in order to convict of an assault under this section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or

transaction which the Crown prosecutes as a felony by the indictment."

This seems to me to be in exact accordance with *R. v. Phelps and Others*. No difficulty can ever occur, as it appears to me, where the felony charged cannot from its nature, or does not, in the manner in which it is charged include more than one assault. One single transaction will be inquired into, and if the prisoner be proved to have been involved in that transaction, the quality of his act, whether felony or assault only, will be the main question. If the evidence satisfies the jury that the assault alleged was felonious, *but fails in fixing the
*187] prisoner as the person committing it, he must be acquitted altogether, and cannot be found guilty of an independent assault committed at another time.

I cannot collect from the language used in the statute, nor can I conceive that the Legislature intended, that where the evidence establishes the commission of a felony including an assault by somebody, the jury can ever be at liberty to convict of an assault only. In such case, either the prisoner must be guilty of the whole charge, or if he be not proved to be the guilty person, he must be acquitted of the whole. Any other assaults proved against the prisoner cannot be taken to be "part of the very act or transaction which the Crown prosecutes as a felony," merely because, in drawing the indictment, they have been so charged, wrongly, and contrary to the real state of the facts. There being a felony proved by the evidence, if the assaults proved against the prisoner be connected with that felony and conduce to it, the prisoner is guilty of felony; if they be not so connected, they are no part of the very act or transaction which the Crown prosecutes as a felony.

If, indeed, the very act or transaction which the Crown prosecutes as a felony turns out by the evidence not to

be felonious, and so no felony at all is proved, then, if the assault be proved against the prisoner, he may be acquitted of felony and convicted of assault. And this may be the case even in murder or manslaughter, for it may happen that the prisoner has severely assaulted the deceased, and the death may have been supposed to have been the result of such assault, and the prisoner may have been indicted for murder or manslaughter under such a supposition, yet it may turn out in evidence that the deceased died from natural causes not occasioned, *nor even aggravated or in any way affected, by [*188 the assault proved, and in such case the prisoner might, I think, be convicted of an assault; and I doubt whether the case of *R. v. Crumpton*, C. & M. 597, was rightly decided, there being in that case, in truth, only one assault proved. So that the view I take of the statute would not make it impossible ever to convict of assault on an indictment for murder or manslaughter, though it would be very unlikely that such a case should occur. I do not however mean, that even if such a consequence did necessarily follow, it would alter my view of the statute. I found my opinion upon what I believe to be the true meaning of the statute, and upon the authority of the two cases to which I have particularly referred. I think that the question, whether the jury can find a verdict of guilty of assault depends, not merely on the indictment or on the course adopted by the prosecutor at the trial, or on what he may have attempted to prove, but on the indictment coupled with what was actually proved, and the conclusion which the jury come to on such proof. I find that, in this case, the death was shewn to have arisen exclusively from one blow and assault not proved to have been committed by the prisoners, that the assaults committed by the prisoners were prior to that blow, and, in fact, unconnected with the death—no

part of the very act and transaction which caused the death, and therefore no part of the very act or transaction which the Crown can fairly be said to have prosecuted as a felony, especially as the act and transaction which did really cause the death was an assault, and was laid in the indictment, but not brought home to the prisoners. If it had been brought home to them, they must have been convicted of felony; it is impossible that they *189] could have been convicted of assault only, for that *assault which was really included in the felony charged; and I cannot, therefore, see how they could have been convicted of the other assaults charged, which were not really included in the felony charged, merely because the framer of the indictment choose to insert them in it.

If I am right in my view of this case so far, then I think that the learned Judge's summing up was right. The second jury, not being bound by the finding of the first, might have found that the assaults, proved on the second trial, were connected with the death; and if so, a great difficulty might have arisen. The point, therefore, was important to the prisoners, it might have been in their favour if found differently from what it was; it could not prejudice them, if found as it was. Again, even if it was wrong to put the point, it was immaterial, for it lay on the prisoners to prove their plea, and, in my opinion, they failed altogether in doing so.

Upon the whole I am clearly of opinion, that the conviction is right.

ALDERSON B.—I am of opinion, in this case, that the prisoners are entitled to the judgment of this Court in their favour.

I had thought that this question had been concluded

by the opinion of the Judges, delivered in *R. v. Birch and Others*, till I heard the opinions of my learned Brethren to the contrary. But as it is now clear that the law on this point is still unsettled, it will be proper to discuss the case on principle, and to try to construe the statute itself before we examine the cases, which it must be allowed are not altogether consistent.

The words of the statute are these, "On the trial of *any person for any of the offences hereinbefore mentioned, or for any felony whatever, where the [*190 crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault against the person, if the evidence shall warrant such finding."

It is clear, *first*, that the words "crime charged" mean crime charged as a felony, for the enactment only takes effect upon an acquittal of the felony; *secondly*, it is clear that the crime charged as a felony must be one which necessarily includes an assault. In other words, the assault to fall within the act, must be an integral part of the felony. It is not necessary that it should be expressly charged on the face of the indictment. It will be sufficient if the felony charged must of necessity include an assault. The crimes of rape, and of cutting and wounding with intent, &c., are instances of this latter proposition. Although there it is not unusual, and perhaps better expressly to charge an assault in the indictment. But in murder and manslaughter it is necessary to do so, for murder and manslaughter do not necessarily include an assault. The cases of death by poisoning, or by criminal omission, are instances of this.

We must therefore, in all cases, look to the charge in the indictment to determine the point. Now in the cases where the indictment charges an assault, it does so for the most part in such general terms, that it is sometimes

impossible, by merely looking at the indictment, to identify the particular assault which is charged as an integral part of the felony. We must therefore often have recourse to the evidence given at the trial to identify the assault. As soon as we do this, we obtain in those cases an immediate criterion. Let me suppose a case of rape.

*191] In evidence, there is given an *attack upon the female by beating her. If this be connected directly with the act of obtaining possession of her person, it is an integral part of the charge of rape. If it be wholly unconnected with that attempt, it is no part of the crime charged. So again, in a charge of felonious wounding, no assault not producing a wound is any part of the crime charged as the felony. It might indeed be receivable in evidence, in order to shew a common purpose, and so to connect the person who assaulted with the felonious act of the other who wounded. But if it fails to do that, then such an assault is not within the provisions of the statute; for the very statement of the assault, as proved, disconnects it with the crime charged.

But suppose in these cases that there are assaults connected with the actual charge, and which actually go to the jury as a part of it, but the jury are not satisfied that the rest of the charge is made out; then the statute does apply, and the verdict of assault may follow upon such proof given, and the party may be punished for the assault mentioned in the indictment, identified by the evidence, and left to the jury as a part of the felony. Thus in *R. v. Brimlow*, 9 C. & P. 366, a case of rape. There a boy was shewn to have attacked a girl for the purpose of obtaining possession of her person, but being under fourteen, he could not be by law, as it is said, guilty of rape. He was found guilty of assault; and yet there he was incapable of committing the felony at all. But

the assault was an intergral part of the rape, which was erroneously charged against him. So, again, in murder. The indictment charges a murder by an assault, by which a mortal injury was given. An assault is proved ; but it is doubtful whether it caused death, or whether the deceased died by some preexisting cause alone. Surely this assault is part of the *charge of murder. It must be left to the jury in order to determine the guilt. [*192 Nothing separates it from the murder but the verdict. If opposing evidence as to the fact of its causing or not causing the death be given, this assault, as part of the murder, put the accused in immediate jeopardy of life. And is it possible to make a legal principal out of the more or less clearness of the evidence as to the assault having caused the death ?

But if this be true of one assault,—and I really do not see how the case I put can be doubtful, (I am sure I have known it the constant practice ever since the statute,)—how are we to distinguish one assault from several assaults ? If the death be charged as being caused by these assaults combined, it is surely the same as if caused by one alone. The several assaults then become as much integral parts of the charge as the one assault was before. And for this I have to cite, in addition to the reason of the thing, the very high authority of my Brother PATTERSON, in *R. v. Thomas Cruse and Mary his wife*, to be found in 2 Moo. C. C. 53, who were charged with causing a bodily injury, dangerous to life, to a poor girl of tender age in their service. First, by striking and beating her with their hands and fists ; secondly, by kicking her in the back ; thirdly, by seizing and lifting her up and striking her head against a wooden beam, and fourthly, by casting and throwing her on a brick floor. In that case there were four distinct assaults. The intent to murder, however, not being made out to the jury's satisfaction, the crime charged, was not a felony. But the prisoners were

found guilty of assault, for the assaults were all parts of the crime charged, and this ruling of my learned Brother was supported by all the Judges on the case being reserved. How does this case differ *in principle from *193] the one now before us? Here several assaults, between two particular days named in the indictment, were charged as together causing death. There, several assaults were charged as producing a bodily injury dangerous to life. Here the assaults causing death were charged as having been committed of malice aforethought. There, the assaults producing a dangerous bodily injury were charged as committed with intent to murder. If the assaults in *R. v. Cruse and Wife* were part of the crime charged, the assaults in *R. v. Bird and Wife*, which fell within the days limited by the indictment, were part of the crime charged also. *Bird and Wife*, therefore, were in jeopardy under the indictment for murder of being punished for these assaults, though not for any other assaults not included within the limits of the days fixed by the indictment. If so, the acquittal being general, *cadit quæstio*: they may plead that acquittal in bar of a second indictment.

But, I understand, that some of my learned Brethren conceive, that the two cases are distinguishable, on the ground, that in the case of *R. v. Bird and Wife* there was given in evidence a particular blow which did cause death, and that so there was a separate felony proved, though not one committed by the prisoners. But this is, I conceive, a fallacy. If the special circumstances of that blow are unknown, (and that they are so, is quite clear), who can properly say that such blow was felonious? To say so is in the nature of a *petitio principii*. Such a blow, by an unknown hand, is in law undistinguishable from a disease causing death, or any other circumstances for which the prisoners are not responsible; [and, if the blow is attributed to a third person, that per-

son has no means of coming before the jury to explain the circumstances of the blow.]

*This, therefore, is I apprehend a distinction [*194 without a difference. I conceive then, that the statute applies in all cases where the crime charged consists necessarily of an assault, and something more, which "something more" converts the assault from a misdemeanor into a felony. Thus, if we analyse a charge of cutting and wounding: it is, first, a wounding which necessarily includes an assault: secondly, it is with one of the intents mentioned in the statute. Now the first, if proved alone, still leaves the case a misdemeanor; it is the finding of the second which alone makes it a felony. The jury in acquitting of the felony, may therefore find the first if proved, which is an assault. The crime of manslaughter by violence in like manner, if divided, is first an assault: secondly, an assault which causes death. Of these two the felony is composed. If the second be not found, the first is an assault: if the second be found, it must in all cases be felony. If, therefore, no one can be found guilty of an assault, unless it be an assault which caused, or contributed to cause death, the statute can never apply to any case of murder or manslaughter at all. But, surely, it would be wrong so to construe the statute; for the statute says, "any felony whatever in which the crime charged includes an assault." It would be a strange construction of it, (unless we are to decide upon some supposed spirit or intention of the Legislature, casting aside the letter altogether), to say that manslaughter by violence, a crime which clearly is a felony, and which as clearly includes an assault, is not within these express words. But this was in substance, the criterion put by the learned Commissioner to the jury, when he summed up the facts on this plea.

On this narrow ground alone of the misdirection, I conceive, that this conviction is clearly wrong, [because *195] *the proper question was not put to the jury].

But I wish also to express my opinion on the more general question. I proceed, therefore, to advert to some of the cases; and first, to *R. v. Watkins*, 2 Moo. C. C. 217, which seems to me to have been decided on right principles, although, I entertain a doubt, whether a clause in the 1 Vict. c. 86, s. 2, not adverted to apparently, might not make it proper to reconsider the particular case, if it should occur again. There the prisoner was charged with breaking and entering a dwelling-house with intent to commit a rape, and also with assaulting *J. S.*, being in the dwelling-house. The Judges, when the case was reserved, thought that the whole felony consisted in the burglary, and that the assault was only an aggravation, and so they held the assault no part of the crime charged as felony, and the conviction of assault wrong: I agree entirely with the principle; though I doubt whether, after the stat. 1 Vict. c. 86, s. 2, expressly made the whole charge [including the assault] a capital felony, the verdict ought not to have been sustained.

To the above cases may be added, the case of *R. v. Guttridge*, 9 C. & P. 471, and the case of *R. v. St. George*, *ibid.* 494, where the law was, I think, clearly laid down by my Brother PARKE.

On the other hand, reliance is placed on the case of *R. v. Phelps*, 2 Moo. C. C. 240, which it is said cannot be reconciled with the above view of the law. On looking at that indictment, which is to be found in C. & M. 180, I find that the murder there was charged by striking and beating the deceased. The point made there was, however, that the assault by *Phelps* was altogether disconnected with the felony. And the Judges decided that of

this he was improperly convicted, and I apprehend that their decision may be *explained thus:—At the close of the case, there were two separate and [*196 distinct charges before the Court, one of assault by *Phelps* alone, and the other of a joint felony at another time by *Southam* and the third prisoner. Now the Judge ought not to have put both to the jury—and if, as was his duty, he put one only, it was clear, that he ought to put the felony to them: *Phelps*, therefore, ought to have been acquitted altogether. It is not like the case of one wounding, which may be a felony in one, and a misdemeanor in another, according to the proof or failure of proof of the intent with which the act was done. There, only one act goes to the jury for their decision. On this ground *R. v. Phelps* may well stand as an authority without affecting this case, and upon the same principle Lord Chief Justice TINDAL acted when he determined the case of *R. v. McPhane and Others*, C. & M. 212. There also three prisoners were indicted for feloniously wounding. As to two of them, a joint act of wounding was proved, but at this act the third prisoner was not present, nor did he concur in it. He afterwards committed another assault on the prosecutor,—Lord Chief Justice TINDAL left the joint felony to the jury, and directed the third prisoner to be acquitted altogether.

I cannot, however, agree with the decision on which, in this case, my Brother TALFOURD very naturally acted at the first trial,—I allude to *R. v. Crumpton*, C. & M. 597, decided by my Brother PATTESON. That was murder by a course of ill-usage, including a beating expressly charged in the indictment. That beating was proved, though it did not contribute to cause the death; but surely it was part of those acts which were, all together, charged as causing death, and so producing the murder. It is not to be presumed, as my learned Brother

*197] is reported to *have said, that this would lead to a fraudulent insertion in the indictment of an assault wholly disconnected with the charge. We cannot act on such a presumption. Indeed, it may perhaps be a little doubtful, whether an assault, charged as having with other acts not *ejusdem generis* caused together the death, would not be so integral a part of the charge as, if not proved, to entitle the prisoner to an acquittal on the ground of a variance as to the mode of death charged in the indictment.

These two cases form the main difficulty, no doubt, in determining the present question. They were both prior to the case of *R. v. Birch and Others*, and I think that that case, properly read and understood, decides the present question. I do not, however, mean to discuss that case now. It has been already sufficiently adverted to by my learned Brethren.

Upon principle, therefore, and the true construction of the statute, added to, as I think, a great preponderance of authority as to that construction, I have come to the conclusion, that, in this case, the defendants are entitled to a judgment in their favour.

PARKE B.—The question submitted to us by the learned Commissioner of oyer and terminer and gaol delivery, in this case is, whether he was right in the direction he gave to the jury?

The mode in which he states the question to have been left was this: after telling the jury that the burden of proof lay upon the prisoner, he directed, that if they were satisfied that there were several distinct or independent assaults, some or any of which did not in *198] any way conduce to the death of the *deceased, it would be their duty to find a verdict for the Crown.

I am of opinion that this was not the true mode of leaving to the jury the only question in issue, *viz.*, whether the prisoner was acquitted of the felony and murder, including the same identical assaults charged in the present indictment? The proper question is, whether the prisoners could have been lawfully convicted on the former indictment of all the assaults charged in this, and whether they were charged by that indictment with those assaults? The first branch of that question being matter of law for the Judge, and the second a question of fact for the jury.

In order to support the plea of *autrefois acquit* in all cases, both these circumstances must occur. It is not enough that the prisoner could have been lawfully convicted on the first indictment for the offence charged in the second; for if so, as the language of an indictment describing any offence, is in general not material as to the date or place, or many other circumstances if in the same county, the indictment would be equally descriptive of many offences of a similar character—and an acquittal of the offence charged on one indictment describing it in proper terms sufficient in point of law, would be an acquittal of every offence of the same sort in the same county against the same person; but in order to constitute a good plea of *autrefois acquit*, the plea must state, and it must be proved that the offence charged in the former indictment, was the same identical offence with that charged in the indictment pleaded to.

This being clearly the rule, there would not be much difficulty in applying it to an ordinary charge of felony—larceny, for instance, of the goods of A. B., or an ordinary charge of assault upon A. B. The *prisoner charged on such an indictment would have to [*199 satisfy the Court, first, that the former indictment on which an acquittal took place, was sufficient in point of

law, so that he was in jeopardy upon it; and secondly, that in that indictment the same offence was charged, for the indictment is in such a form as to apply equally to several different offences. To prove the identity of the offence may not always be easy. If more or less evidence is gone into on the first trial the difficulty is little; if none is offered and the acquittal takes place, it is still an acquittal, entitling the prisoner to an exemption from any subsequent trial for the same identical offence. In such a case there is more difficulty in shewing what the offence charged was, but it may be proved by the testimony of witnesses, who were subpoenaed to go, and did go, before the grand jury, by the proof of what they swore, or perhaps by a grand jurymen himself, or by the evidence of the prosecutor, or by proof how the case was opened by the Counsel for him; in short, by any evidence which would shew what crime was the subject of the inquiry, and would identify the charge, and limit and confine the generality of the indictment to a particular case. If the indictment were in a more precise form, and could be made to identify the offence charged on the face of the indictment itself, and distinguish it from all others, (as *Scotch* indictments I believe do), no such evidence would be required; but where the form is general, and may apply to a great variety of charges, parol evidence is necessarily admitted to shew what the charge was; and if that evidence identifies the charge and shews what it was, its office is ended for this purpose; and whether the evidence given on the former trial was true or false, whether the jury believed or disbelieved it, and what inference it drew from it is immaterial, provided the prisoner was *acquitted; the sole use of such evidence, *200] on a plea of *autrefois acquit*, is to shew what the charge in the indictment really was, and that being done, the effect of the indictment, in the general form, is just

the same as if the offence were particularly described in it, in minute terms, to the exclusion of all others ; and then the maxim *nemo debet bis vexari pro eadem causâ* applies.

No doubt the generality of the terms of the indictment leads to some inconvenience and difficulty, but it is compensated by the great advantage to the administration of justice from the greater latitude allowed to the evidence on the trial, which rarely, indeed never, operates to the prejudice of the prisoner, who generally knows the precise charges on his commitment.

Thus far is very clear, and there is little difficulty in applying this rule to all indictments at common law ; if the former indictment had been, as the present is, for a certain number of assaults, and they were identical, an acquittal on that indictment would be a good bar to this. The only question would be, whether the assaults were identified by adequate evidence ?

But all the difficulty in this case arises from the provision in the stat. 7 Wm. 4 & 1 Vict. c. 85, s. 11, that on an indictment for a felony, the prisoner may be convicted of an assault, which is a departure from the clear and intelligible rules of the common law, and has produced no inconsiderable inconvenience, and amongst the rest, the nice and difficult questions which have occurred.

I think that a proper construction has been put upon it by the eleven Judges who decided the case of *R. v. Birch and Another*, who were the same Judges who decided the following case in 1 Den. C. C. 187.

The Judges, proceeded to construe this statute, and *ascertain what the species of assault contemplated by the 11th section was, found two classes of cases [*201 already decided. If they had held, that wherever the felony charged on the face of the indictment in its nature included an assault, as rape, homicide by violence, feloni-

ous cutting, the prisoner might be convicted of a common assault, wholly unconnected with any felony, the case in 2 Moo. C. C. 123, would have been wrongly decided. They held, therefore, that the indictment was not to be considered as an indictment for the offence of *an assault*, and *also* of a felony.

On the other hand, if the statute was to be considered as applying only to cases where the assault was committed with intent to commit the felony charged in the indictment—to inchoate felonies proved to be such—then all the cases in which parties had been convicted of assaults, where the charge was of felonious cutting, with intent to commit murder, or grievous bodily harm, would have been wrong, for the acquittal went on the ground that the prisoner did not intend to do either.

They therefore held, that the enactment was not to be confined to cases where the prisoner committed an assault in the prosecution of an attempt to commit a felony, nor was it to be extended to all cases in which the indictment for a felony, on the face of it charged an assault. But they were of opinion, that in order to convict of an assault, under this section, the assault must be included in the charge on the face of the indictment, and also be part of the very act or transaction, which the Crown prosecutes as a felony by the indictment. This construction having met with the concurrence of all the Judges, it ought to be abided by. In my judgment, it puts a correct interpretation on the words of the statute.

*202] *The case of *R. v. Phelps* may perhaps be distinguished from this case on the ground already stated by my Brothers MARTIN and ALDERSON. That was a charge of murder by a joint assault or assaults charged upon three persons, and evidence was given to prove it; and one could not be then properly convicted

of a single assault at a different time, and totally unconnected with the transaction, which the Crown prosecuted as a murder. But whether distinguishable or not, seems to me to be immaterial. If not distinguishable, I consider that *R. v. Birch*, which was decided afterwards upon full consideration of all the cases, and in order to settle the rule on the subject, must prevail.

But then on the construction of this, which clearly ought to be the rule, a difference of opinion exists amongst the Judges. As to that part of the rule which relates to the crime charged on *the face of the indictment*, including an assault against the person, there is no difficulty; it applies to felonious cutting, rape, felonious homicide by violence, all of which *in their nature* include a charge of assault against the prisoner, and the charge of murder in this case includes an assault, but it must also be part of the very *act or transaction* which the Crown prosecutes as a murder by the former indictment; and here lies the whole difference. The learned Commissioner thought that, to fall within the rule, it must *really have been*, and not merely *charged* to have been, contributory to the *death* of the deceased, which the Crown charged as a murder, and many of my Brethern are of the same opinion. Whereas, it seems to me, that it is enough to bring the assault within the meaning of this clause, if it is *charged* by the Crown to be part of the very act or transaction which it charges as a *felony, and it is made the subject of inquiry as such. There [*203 must be a *charge* of an assault as parcel of a felony, not necessarily an assault *actually* being a parcel of a felony; just as in the case of a charge of a rape, an assault which the Crown charges as having been committed for the purpose of effecting it though no rape has been committed—or a wounding charged to have been made with intent to kill and murder, when no such intent has been proved—

may be punished on an indictment for either felony, though in one the assault could not contribute to the rape, or in the other to the felonious wounding, for there was neither one nor the other. These assaults form part of the charge of felony made by the Crown in all these cases; they are put in a course of trial, as such, though they did not in truth contribute towards any felony, for no felony was committed.

Therefore, in all these cases, where the charge on the face of the indictment includes an assault, that assault which the Crown means to charge by the express allegation of an assault (for we have only to deal with an express allegation in this case) as part of the very act which it charges as a felony, is virtually charged; and as soon as the assault, which the Crown means so to charge, is identified, marked, and distinguished from all others by competent evidence, the case becomes exactly the same as if the indictment were expanded, and the assault completely described so as clearly to identify it. The prisoner is charged with it, and may be convicted of it on that indictment, if he is acquitted of the felony, (for it is only a conditional charge dependent on that fact,) and if he be acquitted he is acquitted altogether and for ever from the charge and every part of it, just as if he had been indicted and acquitted of the same assault alone, fully identified by time, place, and every *204] other necessary *circumstance to distinguish it from every other assault. The evidence to identify this assault may be any evidence of the same sort, as I have above stated, is admissible to prove the identity of any other charge, not evidence to prove the crime or any part of it *actually committed*, but to prove what the offence was which the Crown did charge.

Feeling quite satisfied that this reasoning is correct, it remains to apply it to the facts of the present case.

A question immediately occurs, whether the 11th section applies to indictments of felonies including a single assault only, or to felonies which include many assaults—a rape or murder may include more assaults than one, and I do not feel a doubt but that in such cases, where the evidence shews that many assaults were meant to be charged as connected with the imputed murder, or rape, or felony, the prisoner may be convicted of them.

Now it appears that in this case, on the former trial, the Crown charged the defendants with certain assaults between certain days, which assaults it charged to be the causes of the death of the deceased, and gave evidence of them, and tried to prove that they were so. The charge in the former trial consisted therefore of these three propositions—that certain assaults were committed by the prisoners—that they were committed *malo animo*—and that they caused the death of the deceased. On the first charge they were put on their trial as well as the last, absolutely, not conditionally, *videlicet*, provided the assaults turned out to have conduced to the death: and if the assaults are identified to be the same as those charged in this indictment, the prisoners were charged with, and acquitted of the assaults now charged. Indeed, if the charge of assault was to be tried *only* in the event of the assaults appearing to the jury to have contributed *to the death, I do not see how they could have [*205 been tried at all as assaults, and the prisoners convicted of them; for if they did contribute to the death, the very assault which is punishable as such being a wrongful act, the offence was manslaughter at the least. It is quite clear, that the Legislature contemplated such an assault as may be involved in the charge of felony, and of which the prisoner could be convicted, though acquitted of the felony—and how that could be,

in a charge of felonious homicide, if the assault actually conduced to the death, I cannot understand.

This direction of the learned Commissioner seems to me, therefore, in any view of the case, to be manifestly wrong, if the act applies to murder or manslaughter at all; a doubt has been suggested whether it does by my Brother ERLE,—but the words of the statute are perfectly clear, according to the ordinary rule of construction, and as they lead to no absurdity or incongruity in any view of the case, I think clearly they must be taken to include, as they expressly state, *every* felony.

If the act does not include murder and manslaughter, the direction would be wrong; but the defendants would have been lawfully convicted of the assault in the present indictment, on the ground that charges of murder and manslaughter were to be dealt with at common law and not under the statute.

In this case, the jury acquitted of the felony, for the blows, it appeared, did not cause the death of the deceased; but the charge of assault in my opinion remained, and the prisoners might have been convicted of those very assaults which are charged on the second indictment,—and having been acquitted of the charge in that indictment, they were acquitted altogether.

And it would be contrary to the wise principle *206] of *our law, that a man should be subject to more than one trial for exactly the same offence.

POLLOCK C. B.—The question in this case, as has been already observed, turns upon the true construction of the stat 7 Wm. 4 & 1 Vict. c. 85, s. 11, by which, for the first time, it became lawful upon an indictment for felony, to convict of a misdemeanor; and we have to consider whether the prisoners could have been properly

found guilty of an assault when, on the former occasion, they were tried and acquitted of the murder, for if they could have been so found guilty, they have once been in peril, and they are now entitled to our judgment on the plea of "*autrefois acquit*."

Under the circumstances presented for our consideration by the learned Commissioner of oyer and terminer, I am not surprised that there should be considerable difference of opinion among the assembled Judges; we are called upon to put a construction upon an act, which, in very general terms, has introduced an anomaly in the administration of the criminal law. The distinction between felony and misdemeanor is as old as the law itself, and many important consequences follow from that distinction. Before the passing of the Prisoners' Counsel Bill, they were more important than they are now, but some important differences still remain. The statute has not abolished the distinction between felony and misdemeanor (whether that would have rendered the case more clear, or whether that, when it came to be fully considered, would not have raised a greater difficulty than we have now to contend with, I shall not pause to inquire), but the statute has introduced, in terms very general, a power *to acquit of felony, and to convict of assault, only where the crime charged [*207 shall include an assault, and the evidence will warrant such finding. The statute makes no specific provision for the present or any other particular case, as distinguished from the general class. It does not provide specially and separately for various very different cases that may be suggested; as, for instance, where some felony has actually been committed by some one, but possibly not by the prisoner, or where it is left in doubt whether it was by the prisoner or not, or where it is clear that no felony has been committed, but an attempt

has been made to commit one by the prisoner, or by a person not before the Court. Nor does the statute apparently make any distinction between the above cases and a case where the whole charge of felony is founded in mistake, and there has really been no felony committed at all, or even attempted, and the charge of felony is founded altogether on error. I think it cannot be matter of surprise, when all these various cases may arise, and the statute consists, as regards this part of it, of a few general words only applicable to all, that much doubt may arise as to their meaning, when it is necessary to apply the same words to cases differing so much from each other.

Here we have to inquire, in the construction of this part of the act, what was in this case "the crime charged," and did it include the assaults in question? If it did, the prisoners have already been acquitted, and cannot be tried again. If it did not, the former acquittal is of no avail, and the present conviction is right.

I think the meaning of the words "crime charged," must be sought for in the old forms under which the jury were addressed by the officer of the Court. "Your charge, therefore, is to inquire whether the prisoners be *208] guilty or not of the felonies"—and, *according to the new practice introduced by this act, the charge to the jury would be to inquire whether the prisoners were guilty or not guilty of the felony and assault,—and the question again returns, what would be the assault thus alluded to? It appears to me, that in a case where a felony (of whatever sort) has been actually committed, the charge is the felony committed, and the means whereby it was committed; and I entirely agree with the doctrine laid down by my Brother PARKE, in the case of *R. v. St. George*, 9 C. & P. 491, that the prisoners can only be found guilty, under this act of Parliament, of an as-

sault involved in and connected with the principal charge of felony. This cannot, I think, depend upon the mistake or blunder of the prosecutor, or of his Counsel, or of any of the witnesses; it depends upon the truth itself, as it may come out in evidence and be found by the jury.

It seems to me contrary to first principles, in administering the criminal law, and in construing this act of Parliament, that an accused party who may have been guilty of a common assault, and a common assault only, never intending to commit a felony, or even contemplating it, should be liable to three years' imprisonment, and according to some constructions of the act to hard labour during that time, because some blundering clerk of assize has drawn an indictment, or some rash prosecutor has made an accusation, or some mistaken or incredible witness has associated, by the indictment, by the accusation, or by the evidence, this simple assault with a felony, be it murder or other, with which felony in truth and in fact it had no connection whatever.

In this case the charge was the murder of *Mary Ann Parsons*. It appears that she came to her death by a single blow, which could not, by the evidence, *be imputed to either of the defendants. The guilt [*209 of both might be suspected with reference even to that fatal blow; but the guilt of neither was proved, and therefore, very properly, both were acquitted. That very acquittal on that ground, in my judgment, dissociated all other assaults that did not tend to the death from the crime charged, and the crime charged did not include those assaults, and I think it was not lawful for the jury to convict of those assaults. It would follow from this, that they were properly convicted of assaults in the case now before us.

I must admit the construction of the act as to this

matter is by no means free from great doubt: the difference of opinion of the assembled Judges sufficiently attests this. Many cases of difficulty may be presented either way, and I must freely confess that I doubt whether any construction of the statute would afford a satisfactory solution of all the difficulties that might arise in the various cases that might be suggested. During the course of the two arguments, and the deliberations that have ensued, I have found it difficult to come to a conclusion which I felt to be perfectly satisfactory; but comparing the difficulties on the one side and on the other, I have at length felt it my duty to pronounce the judgment I have already expressed; and while I disclaim any argument or view of any sort founded on this particular case itself, I own I have been fortified by this consideration, that this statute is manifestly a departure from the common law; as far as its enactments are clear, we are bound to obey and to enforce them; but when they become doubtful, (and who shall say that this is not so?), it is safe, and, I think it our duty, to stand by the common law.

*210] *JERVIS C. J.—I am of opinion that the conviction in this case was wrong.

The question turns upon the true construction of the stat. 7 Wm. 4 & 1 Vict. c. 85, s. 11, which, in *R. v. Birch*, 1 Den. C. C. 185, was considered by eleven Judges, who consulted all the authorities, and professed to expound the act with a precision which could not mislead. That case was principally relied upon in argument by the defendants' Counsel, and ought to be a ruling authority upon the subject; but, unfortunately, some question the correctness of the rule which is there laid down, whilst others, adopting it, arrive at a conclusion altogether dif-

ferent from that which was intended by the framers of the rule. We cannot, therefore, take that case as conclusive upon the present occasion; and inasmuch as a reference to all the authorities has produced this most unsatisfactory result, I must, unaided by authority, endeavor to put a construction upon the statute itself.

I take it for granted, that in all cases where the act implies, and the evidence warrants such finding, the jury must find the prisoner guilty of assault. It is not left to their option to convict of assault, or to acquit the prisoner altogether, and leave him for further prosecution in the form best suited to the justice of the case; the act is compulsory, and the prisoner is in jeopardy in all cases to which the act applies. Numerous inconveniences might be pointed out as the certain result of this admitted construction.

The statute only applies to an indictment for felony, where the crime charged includes an assault. It is absolutely necessary that the crime charged should legally include an assault. Crimes of this nature are murder by violence, rape, robbery, stabbing, and the like. You cannot bring the case within the act by averring in the indictment an assault as accompanying *a crime [*211 which legally does not include an assault. Nor, on the other hand, is it necessary, in order to found the jurisdiction of the jury, to state an assault in an indictment for a crime which legally includes an assault. It is prudent to do so, but it is not in strictness necessary; for where the crime charged includes an assault by implication, the charge of assault appears on the indictment, and thus the rule is satisfied which requires that, when the record is made up, the charge should appear upon which the prisoner is found guilty, and subsequently punished.

But, although the crime charged does legally include

an assault, it does not follow that the act may be called into operation. The jury have but a conditional power to find the prisoner guilty of the assault—they must first acquit him of the felony. The trial, therefore, throughout, is a trial for felony, to be governed by the rules which regulate such trials; and if one assault only be laid in the indictment as the cause of death by violence, or if the crime charged in its nature, legally, or in fact, include but one assault, one assault only can be produced in evidence, as tending to prove the crime charged; and the prosecutor having made his election, and proved an assault, cannot abandon that and produce evidence of another assault, having no relevancy to the proof of the crime charged, but committed upon another occasion. So, if several assaults are laid in the indictment as causing the death, or if the crime charged legally may, and in fact does include several assaults, the same rule will prevail, subject to the same qualifications, for the trial is proceeding for felony, the evidence produced is produced to prove the felony, and is to be controlled by the rules which are applicable to trials for felony. When the whole evidence is closed, and before they can find him *212] *guilty of assault, the jury must acquit the prisoner of the felony. Upon what ground is that acquittal to take place? Surely, because the evidence warrants such an acquittal. The prisoner could not be guilty of the felony, if there was no felony, or if the felony was committed by another person.

But the evidence which was brought to prove the felony, and which was insufficient for that purpose, may prove, beyond doubt, that the prisoner was guilty of assault. The crime charged includes an assault—the jury have acquitted the prisoners of the felony—the evidence warrants a finding of assault,—what are the jury to do?

The act is admitted to be compulsory. They shall "find a verdict of guilty of assault against the person indicted."

Thus, reading the statute, full effect is given to the plain common sense meaning of every word used. I have not sought for the object of the enactment, for where there is no ambiguity, no foreign aid is necessary to expound an act, and it is dangerous to speculate upon the motives of those who may pass measures through Parliament, particularly if the plain meaning of words is to be disregarded for the purpose of effectuating that supposed intention.

It is contended, that the assault of which alone the jury can convict the prisoner, is that included in the crime charged, and that, consequently, if the crime charged be committed by another, the prisoner cannot be guilty of that assault. This restriction is not, in my opinion, justified by the letter of the act, but seems to me to have been intentionally excluded from it. The jury are not to find the prisoner guilty "of the assault so included in the crime charged," nor "of the said assault," nor "of such assault," nor "of the assault," nor even "of an assault," but "of assault." If the prisoner cannot be convicted of assault, where the crime *charged was [*213 committed by another, because, in that case, the assault by the prisoner cannot be included in the crime charged, it would seem to follow, that were the crime charged did not exist in fact, it could not include an assault by the prisoner. In the latter case, however, it is admitted that the prisoner might be convicted of the assault. But it is said, that every felony within this act consists of an assault and something more, which makes it a felony, and that, if a third party is guilty of the whole felony, including the assault, the whole charge is exhausted, and the prisoner cannot be guilty of the assault. This construction gives a meaning to the words

of the statute, which I think they do not bear. But independently of that, it makes the jeopardy of the prisoner, for the assault, to depend upon the guilt or innocence of a third party, which must be determined in his absence by a jury who are not sworn to try that fact.

In strictness, indeed, there was in this case no proof that homicide had been committed by any one. The death was caused by a blow inflicted on the child's head, whether by the prisoners, or by other persons, under what circumstances, or as the mere result of a fall, was not proved, and could not legally be determined by the jury. They could only acquit the prisoners of the felony; having done so, their functions, in so far as the felony was concerned, were at an end; they could not inquire by whom the felony was committed, or if a felony was committed at all.

The soundness of the distinction contended for may be tested by the actual circumstances of this particular case. If it had been proved that the child had not died, it is admitted that the prisoners might have been convicted of assault upon this indictment for murder. If the death resulted from natural causes, it *is admitted that *214] the prisoners might have been convicted of assault upon this indictment for murder. If it was homicide by another, it is said that the prisoners could not have been convicted of assault upon this indictment for murder. But it is only homicide if the blow was inflicted by the act of another person; if it was the result of a fall, for this purpose, the death was natural. Thus the liability of the prisoners to be convicted of an assault, is made to depend upon a matter which the jury cannot legally settle: they can say that the prisoners are not guilty of the felony, but whether the death was felonious, justifiable, accidental, or natural, they cannot legally determine.

For these reasons I am of opinion that, upon the true

construction of this statute, a prisoner may be acquitted of the felony and be convicted of assault upon an indictment for felony, wherever the crime charged legally includes an assault, and the evidence properly admissible, and produced to prove the crime charged, warrants the finding of assault, and that such liability to conviction for assault does not depend upon the ground of the acquittal for felony, but will equally exist, whether the felony was disproved or was shewn to have been committed by a third party.

It follows, from this opinion, that in my judgment the proper question was not left to the jury by the learned Commissioner, upon this plea of *autrefois acquit*. Upon such a plea three questions arise. The first is a question of law; is the crime charged upon the first indictment a crime of the class which includes an assault? If it is, then arises the second question, which is a question of fact: What assault or assaults was or were in fact included in the first indictment? The affirmative of this lies upon the prisoner, and from the generality of our criminal pleading, *more especially in cases under this statute, where the assaults may appear upon [215 the indictment by implication only, may be attended with much practical difficulty. If our indictments had been in the *Scotch* form, with a condescendence of the various assaults consummated by the felony, the task would be easy; the mere production of the record, with the acquittal of the felony, would leave the charges of assault, upon which the prisoner would have been in jeopardy upon the first trial, clearly defined. In the absence of such assistance, the prisoner must resort to the best evidence in his power. If the first case was tried out he may prove what occurred upon that trial,—the opening of Counsel,—the examination of witnesses, and thus shew what assaults were brought forward, and

were legally admissible upon that indictment, as tending to prove the crime charged. If an acquittal was taken without evidence he may for the same purpose, perhaps, prove what occurred before the grand jury when the bill was found; for such evidence is not within the oath of the grand jury, "the Queen's Counsel and their own," or he may resort to the depositions or the instructions upon which the bill was framed; it is not necessary, however, now to enlarge further upon this subject. The same difficulty arises in a greater or less degree upon all pleas of *autrefois acquit* and *autrefois convict*, and the evidence upon such pleas in all cases must be governed by the same rules.

Having designated or ear-marked the assaults included in the first indictment, the third question, likewise a question of fact, occurs:—are the assaults, so designated, the identical assaults which the prosecutor professes to produce upon the second trial? This likewise must be proved by the prisoner; but if it is established, then the identity of the charge being made out, the prisoner was before in jeopardy upon *the same charge, and is *216] entitled to judgment upon the plea of *autrefois acquit*.

For these reasons I am of opinion, that the proper question was not put to the jury; that the conviction was wrong, and that the prisoners were entitled to judgment upon the plea of *autrefois acquit*.

Lord CAMPBELL C. J.—After long and anxious deliberation, I have come to the conclusion, that in this case the former acquittal is a bar to the present prosecution. I should feel deep regret if great offenders were to escape punishment, but the due administration of criminal justice requires, that the forms of judicial procedure should

be observed. These forms are devised for the detection of guilt, and for the protection of innocence.

In the present instance, the defence does not rest upon a mere technicality, but upon the sacred maxim, that "no one ought to be twice tried for the same cause." The only question is, whether the defendants might, under the former indictment, have been lawfully convicted of the assaults for which they are now prosecuted, and it is the very same question which we should have had to consider if they had been convicted of these assaults, and and the validity of that conviction had been referred to this Court. A majority of the Judges appear to think that the general acquittal was proper; but I am humbly of opinion that the second trial was unnecessary and unlawful.

The case entirely depends upon the construction of the stat. 7 Wm. 4 & 1 Vict. c. 85, s. 11. Let us first consider the mischief which this enactment was intended to remedy. At common law, a person indicted for a felony which involved an assault, must have been wholly acquitted *although proved to have committed the assault charged in the indictment, and given in evidence by the Crown, as the means of committing the felony, if his attempt to commit the felony was not fully accomplished, or if a felony had been committed to which the assault did not conduce, or if no felony had been committed or attempted. This was found to be extremely inconvenient, for the prisoner, proved to have committed a grave offence of which he was accused, either got off with perfect impunity, or a new indictment was preferred against him for the same assault, and the same evidence was given against him before another jury. In the former event, public scandal was given by a failure of justice, and in the latter, the accused party was unnecessarily harassed, and unnecessary expense

and trouble were occasioned by a second trial. I conceive that the object of the statute was to permit, in spite of the technical rule of the common law which forbids, under an indictment for felony, a conviction for an offence amounting only to a misdemeanor, that wherever there is an indictment for a felony involving an assault, the prisoner may be convicted of the assault charged in the indictment, and given in evidence as conducive to the felony, although he be acquitted of the felony, and whether the assault was or was not, in point of fact, conducive to the felony.

This, surely, would be a very reasonable law, both for the sake of the public and of the prisoner. To my mind it is enacted by the following words—"On the trial of any person for any felony, where the crime charged shall include an assault against the person, it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of assault, if the evidence shall warrant such finding."

*218] Soon after the act passed, a construction of it was *contended for, confining its operation to cases in which the assault was committed in an attempt to commit the felony charged. For this construction, plausible reasons were urged, but it was—I think very properly—overruled by several solemn decisions of the Judges.

Thus, the quality of the assault, that it shall actually be conducive to the felony is gone. And I must confess, that I can conceive no other intelligible rule to go by, than that the assault shall be charged, and shall be given in evidence, as conducive to the felony. With these conditions, the party accused has ample notice of the offence which he has to answer, and an ample opportunity of vindicating his innocence. The statute certainly did not mean practically to give the prosecutor

the advantage of adding to the indictment a count for an assault unconnected with the felony—but the rule which I would lay down, admits of no such perversion. The assault must be an assault against the person, and included in the crime charged—if it be, then it shall be lawful for the jury to acquit of the felony, and to find a verdict of guilty of an assault, should the evidence warrant such finding. I know not why a proviso is to be introduced that the statute shall not apply where evidence is subsequently given, that the assault charged, and proved as conducing to the felony, did not conduce to it.

In the present case the assaults which are the subject of the second indictment for misdemeanor, were expressly charged in the second and third counts of the indictment for murder, and they were actually given in evidence at the former trial, with the express purpose of proving the felony alleged in those counts; moreover, when they were given in evidence, they were material and powerful proof that the crime of murder had been committed by the prisoners. *Subsequently, medical witnesses [*219 of skill and credit swore that the death was caused, exclusively, by a blow on the head of the deceased, not shewn to have been inflicted by either of the prisoners. Thereupon, my Brother TALFOURD most properly interposed, and advised the jury to acquit them of the murder; but with the most sincere deference for his opinion, and that of my learned Brethren who agree with him, I think he ought to have directed the jury, that if they believed the medical witnesses, and acquitted the prisoners of the murder, they must direct their attention to the uncontradicted evidence proving the assaults, and find a verdict of “guilty” upon the portions of the indictment charging those assaults, should they think “that the evidence warranted such finding;” that is to say, if they

believed the uncontradicted, and unsuspected witnesses for the Crown, who swore to those assaults. Being once connected with the felony, and sufficient to prove it, if the death were not imputed to another cause, I do not understand when or how they were disconnected from it, and became independent and distinct assaults. Juries, in practice, defer to the opinion of the Judge upon such an occasion, and a formal summing up becomes unnecessary; but if there be any evidence to go to the jury, from which they might draw an inference of guilt, in strict law it is supposed to be submitted to them. The assaults proved against the prisoners were connected with the felony till the verdict of not guilty was pronounced. But it is before the verdict is pronounced, as I conceive, that the Judge is to tell the jury that, if they acquit of felony, they may convict of assault; it is not, by the verdict of "not guilty of the felony," that the Judge is prevented from drawing the attention of the jury to the minor offence. The statute clearly supposes the direction to be given to the jury, *that if they acquit of the felony, they may find a verdict of guilty of assault, the evidence warranting such finding.

In this case, morally speaking, the jury would not have been justified in disbelieving the medical evidence, and concluding that the assaults of which the prisoners were proved to have been guilty caused the death. But cases may easily be imagined in which the jury would be justified in disbelieving medical evidence, and, in spite of it, properly finding a verdict of guilty of the murder. How then are we to lay down a rule, that assaults once connected with the felony are to be disconnected from it by a medical opinion that they did not conduce to the death? It was hardly contended at the bar that the prisoners might not have been convicted of the assaults, if it had turned out to be a case in which no felony appeared to

be committed. And I cannot understand how the case is less within the statute, because the evidence led to the belief that a murder had been perpetrated in which the prisoners were not implicated.

A good deal of stress was laid upon the power given by the 8th section of 7 Wm. 4 & 1 Vict. c. 85, to sentence any person found guilty of an offence, within the act, to hard labour and solitary confinement. But this argument was exhausted, when the Judges determined that the enactment about convicting of assaults, was not limited to assaults in an attempt to commit a felony. The power of punishing by hard labour and solitary confinement is only discretionary—and the Legislature probably thought that it might often be usefully exercised, if the assault was connected with the commission of a felony, although proof had not been given that the felony was attempted. In the present case, had there been a conviction for the assault at the first trial, simple imprisonment might have been generally *con- [*221 sidered an inadequate punishment for the delinquency established.

I do not think it necessary to refer to the various decisions which have been commented upon by my learned Brothers, who have preceded me. I will content myself with observing, that the most recent of these, *R. v. Birch*, seems to me to be an express authority for this construction of the statute. There no felony had been consummated; and the jury expressly found, that the assault had not been committed with intent to rob. Yet the Judges unanimously held, that the prisoner had been properly found guilty of the assault. Could it have made any difference in that case, if there had been additional evidence, that after *Birch*, the prisoner, struck the prosecutor, a stranger was seen to give him an additional blow, to take his purse, and then to escape?

I must beg the particular notice of my Brethren to the replication to the plea of *autrefois acquit*, on which the issue is joined, "that the prisoners were not acquitted of the felony and murder, including the same identical assaults charged in the present indictment." The case submitted to us expressly states, that the assaults for which the second indictment was preferred, were given in evidence at the former trial; that "the Counsel for the prosecution, in opening the case to the jury on the former trial, had opened these different assaults as conducive to the death;" and, that "it was not shewn on the second trial, that there were any other assaults committed but those which had been given in evidence on the former trial." I am bound to say that, upon this statement the prisoners were acquitted of the same identical assaults charged in the present indictment, and are, therefore, entitled to our judgment.

I need only very briefly advert to the argument urged *222] *by the Counsel for the prosecution, that even upon the supposition that the prisoners might have been convicted of the assaults under the first indictment, yet, as the Judge did not submit this question to the jury, the general acquittal does not entitle them to plead *autrefois acquit* in bar of the indictment for misdemeanor; but if they might lawfully have been convicted of the assault at the first trial, they were then in hazard, and they are not to be put again in hazard of being convicted upon the same charge. There would be no safety for mankind if the benefit of a former acquittal might be done away with by inquiring into the terms in which the Judge summed up at the former trial, although the indictment, and the evidence then given, sought to convict the prisoner of the same offence for which he is again prosecuted, and, if he were guilty of it, there was an opportunity of establishing his guilt. It is only the

ignorant and the presumptuous who would propose that a man should be liable to be again accused after a judgment regularly given, pronouncing him to be innocent. According to this novel doctrine, the Crown might a second time prosecute for high treason a person who had been acquitted of the charge by a jury of his country, and there would be no end to prosecutions for felony or misdemeanor prompted by private malevolence.

I have only further to observe, that I think the direction of the learned Judge at the last trial was exceptionable; and I hardly see how the conviction under it can be approved by any who are not of opinion that there can only be a conviction of assault under 7 Wm. 4, and 1 Vict. c. 85, where the assault was in an attempt to commit the felony. He told the jury, that "if they were satisfied that there were several distinct and independent assaults, some or one of which did not in *any [*223 way conduce to the death of the deceased, it would be their duty to find a verdict for the Crown." I am of opinion that he should only have directed the jury to find for the Crown, if there were any assault in evidence which was not included in the former indictment, and not offered in evidence at the former trial as part of the transaction, so that it might be considered an independent and distinct assault unconnected with the felony. As he directed the jury, they were bound to convict, if there was any assault in evidence which did not in fact conduce to the death of the deceased, however it might have been connected with the felony, and, indeed, with whatever intent it might have been inflicted. The result of the evidence at the first trial is supposed to be, that the death was caused exclusively by a blow subsequently given, which was not the subject of the second indictment. Upon this supposition, no prior assault could have conduced to the death. There-

fore the jury, at the last trial, were obliged to find a verdict of "Guilty," as none of the assaults proved did conduce to the death, although they were all offered in evidence as conducing to the death, and were substantial evidence to prove the murder. This seems to me not only to differ from my construction of the statute, but to put a narrower construction upon it than it has at any time received since the decisions, that the assault need not be committed in an attempt to commit the felony.

For these reasons, I think that the conviction ought to be quashed; but a majority of the Court being of a contrary opinion, the conviction is affirmed, and the judgment, which was respited, will be pronounced upon the defendants at the next assizes for the county of *Devon*.

I hope I may, without impropriety, express a wish *that the Legislature will speedily repeal or ex-
*224] plain the enactment which has caused such confusion. Of course I am ready to abandon the construction of it for which I have been contending, and most respectfully and submissively to be governed by the opinion of my learned Brethern who differ from me; but I have not been able to gather from them any clear and certain rule for my future guidance, and I am afraid that without the interference of Parliament, notwithstanding our best efforts to be unanimous, we ourselves, as well as others, may again find it difficult to anticipate the result of our deliberations.

COPY—PLEA.

And the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* in their own proper persons now come into Court here and having heard the said indictment read and the matters therein contained say that they ought not to be put to answer the said indictment they having been heretofore in due manner of law acquitted of the premises in and by the said

indictment above specified and charged upon them and for the plea to the said indictment they say that our said lady the Queen ought not further to prosecute the said indictment against them because they say that heretofore to wit at the assizes and general sessions of oyer and terminer and general delivery of the gaol of our lady the Queen holden at the castle of *Exeter* in and for the county of *Devon* on *Saturday* the sixteenth day of *March* in the thirteen year of the reign of our sovereign lady *Victoria* by the grace of God of the United Kingdom of *Great Britain* and *Ireland* Queen Defender of the Faith before Sir *William Erle* Knight one of the Justices of our lady the Queen assigned to hold pleas before the Queen herself Sir *Thomas Noon Talfourd* Knight one of the Justices of our lady the Queen of her Court of Common Pleas and others their fellows Justices of our lady the Queen assigned by letters patent of our said lady the Queen under the Great Seal of the United Kingdom of *Great Britain* and *Ireland* to them the said Sir *William Erle* Sir *Thomas Noon Talfourd* and others their fellows Justices of our said lady the Queen and to any two or more of them directed (of whom one of them the said Sir *William Erle* and Sir *Thomas Noon Talfourd* or of others in the said letters patent named our said lady the Queen willed to be one) they the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* stood indicted and were duly *arraigned [*225 upon a certain indictment which charged them the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* by the names and descriptions of *Robert Courtice Bird* late of the parish of *Buckland brewer* in the county of *Devon* labourer and *Sarah* the wife of the said *Robert Courtice Bird* late of the same parish for that they the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* not having the fear of God before their eyes but being moved and seduced by the instigation of the Devil on the fifth day of *November* in the year of our Lord 1849 with force and arms at the parish aforesaid in the county aforesaid in and upon one *Mary Ann Parsons* in the peace of God and our said lady the Queen then and there being unlawfully feloniously wilfully and of their malice aforethought did make an assault. And that the said *Robert Courtice Bird* and *Sarah* his wife with a certain stick of the value of a penny which they the said *Robert Courtice Bird* and *Sarah* his wife in their right hands then and there had and held the said *Mary Ann Parsons* in and upon the head chest shoulders back arms legs and thighs of her the said *Mary Ann Parsons* then and there feloniously wilfully and of their malice aforethought did strike and beat they the said *Robert Courtice Bird* and *Sarah* his wife giving to the said *Mary Ann Parsons* then and there thereby to wit with the stick aforesaid in and upon the head chest shoulders back arms legs and thighs of her the said *Mary Ann Parsons* divers mortal bruises of which the said *Mary Ann Parsons* from the said fifth day of *November* in the year aforesaid until the fourth day of *January* in the year of our Lord 1850 at the parish aforesaid in the county aforesaid did languish and languishingly did live on which said fourth day of *January* in the year last aforesaid the said *Mary Ann Parsons* at the parish aforesaid in the county aforesaid of the said mortal bruises died. And so the said *Robert Courtice Bird* and *Sarah* his wife the said *Mary Ann Parsons* in manner and form aforesaid feloniously wilfully unlawfully and of their malice aforethought did kill and murder against the peace of our lady the Queen her crown and dignity.

And also for that they the said *Robert Courtice Bird* and the said *Sarah* his

wife not having the fear of God before their eyes but being moved and seduced by the instigation of the Devil on the fifth day of *November* in the year of our Lord 1849 and on divers other days and times between that day and the third day of *January* in the year of our Lord 1850 to wit on the first day of *December* in the year of our Lord 1849 and the first day of *January* in the year of our Lord 1850 respectively with force and arms at the parish aforesaid in the county aforesaid in and upon one *Mary Ann Parsons* in the peace of God and our said lady the Queen then and there being feloniously wilfully wickedly unlawfully and of their malice aforethought did make divers to wit ten assaults and that the said *Robert Courtice Bird* and *Sarah* his wife with a certain stick to wit of the value of one penny which they the said *Robert Courtice Bird* and *Sarah* his wife in their right hands then and there to wit at the several times aforesaid at the parish aforesaid in the county aforesaid had and held the said *Mary Ann Parsons* *226] in and upon the head *chest shoulders arms legs and thighs of her the said *Mary Ann Parsons* then and there to wit at the several times aforesaid at the parish aforesaid and county aforesaid feloniously wilfully wickedly unlawfully and of their malice aforethought did strike and beat they the said *Robert Courtice Bird* and *Sarah* his wife to the said *Mary Ann Parsons* then and there thereby to wit with the said stick at the several times aforesaid at the parish aforesaid in the county aforesaid giving to the said *Mary Ann Parsons* in and upon the head chest shoulders arms legs and thighs of her the said *Mary Ann Parsons* divers to wit ten mortal bruises of which said mortal bruises the said *Mary Ann Parsons* from the said fifth day of *November* in the year aforesaid and the several other days aforesaid until the fourth day of *January* in the year of our Lord 1850 at the parish aforesaid in the county aforesaid did languish and languishingly did live on which said fourth day of *January* in the year last aforesaid the said *Mary Ann Parsons* at the parish aforesaid in the county aforesaid of the said mortal bruises died. And so the said *Robert Courtice Bird* and *Sarah* his wife the said *Mary Ann Parsons* in manner and form aforesaid feloniously wilfully unlawfully and wickedly and of their malice aforethought did kill and murder against the peace of our lady the Queen her crown and dignity.

And also for that they the said *Robert Courtice Bird* and the said *Sarah* his wife not having the fear of God before their eyes but being moved and seduced by the instigation of the Devil on the fifth day of *November* in the year of our Lord 1849 and on divers other days and times between that day and the third day of *January* in the year of our Lord 1850 to wit on the first day of *December* in the year of our Lord 1849 and the first day of *January* in the year of our Lord 1850 respectively with force and arms at the parish aforesaid in the county aforesaid in and upon one *Mary Ann Parsons* in the peace of God and our said lady the Queen then and there being feloniously wilfully wickedly and unlawfully and of their malice aforethought did make divers to wit ten assaults and that the said *Robert Courtice Bird* with a certain stick of the value of one penny which he the said *Robert Courtice Bird*, in his right hand then and there to wit at the several times aforesaid at the parish aforesaid and county aforesaid had and held and the said *Sarah* the wife of the said *Robert Courtice Bird* with a certain other stick of the value of one penny which she the said *Sarah* in her right hand then and there to wit at the several times aforesaid at the parish aforesaid and county aforesaid had and held the said *Mary Ann Parsons* in and upon the head chest shoulders arms legs and thighs of her the said *Mary Ann Parsons* then and there to wit at the

several times aforesaid at the parish aforesaid and county aforesaid feloniously wilfully wickedly unlawfully and of their malice aforethought did respectively strike and beat they the said *Robert Courtice Bird* and *Sarah* his wife respectively to the said *Mary Ann Parsons* then and thereby to wit at the several times aforesaid at the parish aforesaid in the county aforesaid with the several sticks aforesaid so held by them respectively as aforesaid at the parish aforesaid in the county aforesaid giving with this that they respectively then and there thereby gave to the said *Mary Ann Parsons* in and upon the head chest shoulders arm legs and thighs [*227 of her the said *Mary Ann Parsons* divers to wit ten mortal bruises of which said mortal bruises the said *Mary Ann Parsons* from the said fifth day of *November* in the year of our Lord aforesaid and the several other days aforesaid until the fourth day of *January* in the year of our Lord 1850 at the parish aforesaid in the county aforesaid did languish and languishing did live on which said fourth day of *January* in the year last afterwards the said *Mary Ann Parsons* at the parish aforesaid and county aforesaid of the said mortal bruises so given as aforesaid died. And so the said *Robert Courtice Bird* and *Sarah* his wife the said *Mary Ann Parsons* in manner and form aforesaid by the means aforesaid feloniously wilfully unlawfully wickedly and of their malice aforethought did kill and murder against the peace of our lady the Queen her crown and dignity.

And also for that they the said *Robert Courtice Bird* and the said *Sarah* his wife not having the fear of God before their eyes but being moved and seduced by the instigation of the Devil on the fifth day of *November* in the year of our Lord 1849 and on divers other days and times between that day and the third day of *January* in the year of our Lord 1850 with force and arms at the parish aforesaid in the county aforesaid in and upon the said *Mary Ann Parsons* in the peace of God and our said lady the Queen then and there being feloniously wilfully unlawfully and of their malice aforethought did make divers assaults and that the said *Robert Courtice Bird* and *Sarah* his wife with a certain scourge to wit a scourge made of certain leather thongs to a certain stick affixed of the value of a penny which they the said *Robert Courtice Bird* and *Sarah* his wife in their right hands then and there to wit at the several times aforesaid at the parish aforesaid and county aforesaid had and held the said *Mary Ann Parsons* in and upon the head chest shoulders back arms legs and thighs of her the said *Mary Ann Parsons* then and there feloniously wilfully and of their malice aforethought did strike and beat they the said *Robert Courtice Bird* and *Sarah* his wife giving to the said *Mary Ann Parsons* then and there thereby to wit with the scourge aforesaid at the several times aforesaid at the parish aforesaid in the county aforesaid in and upon the head chest shoulders back arms legs and thighs of her the said *Mary Ann Parsons* divers mortal bruises of which said mortal bruises the said *Mary Ann Parsons* from the said fifth day of *November* and the said other days and times until the said fourth day of *January* in the year of our Lord 1850 aforesaid at the parish aforesaid in the county aforesaid did languish and languishing did live on which said fourth day of *January* in the year last aforesaid the said *Mary Ann Parsons* at the parish aforesaid in the county aforesaid of the said several mortal bruises died. And so the said *Robert Courtice Bird* and *Sarah* his wife the said *Mary Ann Parsons* in manner and form aforesaid by the means aforesaid feloniously wilfully and of their malice aforesaid did kill and murder against the peace of our lady the Queen her crown and dignity.

And also for that they the said *Robert Courtice Bird* and the said *Sarah* his

wife not having the fear of God before their eyes but being *moved and
 *228] seduced by the instigation of the Devil on the first day of *January* in the
 year of our Lord 1850 with force and arms at the parish aforesaid in the county
 aforesaid in and upon the said *Mary Ann Parsons* in the peace of God and our
 lady the queen then and there being feloniously wilfully wickedly and unlawfully
 and of their malice aforethought did make an assault and that the said *Robert*
Courtice Bird with both his hands and the said *Sarah Bird* with both her hands
 the said *Mary Ann Parsons* to and against the ground then and there feloniously
 wilfully wickedly unlawfully and of their malice aforethought did cast and throw
 by which said casting and throwing the said *Mary Ann Parsons* to and against
 the ground the said *Robert Courtice Bird* and *Sarah Bird* then and there gave the
 said *Mary Ann Parsons* divers mortal bruises in and upon the head stomach sides
 and back of her the said *Mary Ann Parsons* of which said mortal bruises the said
Mary Ann Parsons from the said first day of *January* in the year of our Lord 1850
 until the fourth day of *January* in the year of our Lord 1850 to wit then and there
 at the parish aforesaid in the county aforesaid did languish and languishing did
 live on which said fourth day of *January* in the year last aforesaid the said *Mary*
Ann Parsons at the parish aforesaid in the county aforesaid of the said mortal
 bruises died. And so the said *Robert Courtice Bird* and *Sarah* his wife the said
Mary Ann Parsons in manner and form aforesaid by the means aforesaid feloni-
 ously wickedly wilfully unlawfully of their malice aforethought did kill and mur-
 der against the peace of our lady the Queen her crown and dignity.

And also for that they the said *Robert Courtice Bird* and the said *Sarah* his wife
 not having the fear of God before their eyes but being moved and seduced by the
 instigation of the Devil on the first day of *January* in the year of our Lord 1850
 with force and arms at the parish aforesaid in the county aforesaid in and upon
 the said *Mary Ann Parsons* in the peace of God and our lady the Queen then and
 there being feloniously wilfully wickedly and unlawfully and of their malice
 aforethought did make an assault and that the said *Robert Courtice Bird* then and
 there with both his hands and the said *Sarah* the wife of the said *Robert Courtice*
Bird then and there with both her hands the said *Mary Ann Parsons* to and against
 the ground then and there feloniously wickedly wilfully unlawfully and of their
 malice aforethought respectively did then and there cast and throw and that the
 said *Robert Courtice Bird* then and there with both the feet of him the said *Robert*
Courtice Bird and the said *Sarah* the wife of the said *Robert Courtice Bird* then
 and there with both the feet of her the said *Sarah* whilst the said *Mary Ann Par-*
sons being so then and there cast and thrown to and against the ground then was
 then and there upon the ground the said *Mary Ann Parsons* in and upon the head
 stomach back and sides of her the said *Mary Ann Parsons* then and there feloni-
 ously wickedly wilfully and unlawfully and of their malice aforethought did re-
 spectively then and there strike beat and kick they the said *Robert Courtice Bird*
 and *Sarah* his wife then and there respectively as well by the casting and throwing
 of her the said *Mary Ann *Parsons* to the ground as aforesaid as also by
 *229] striking beating and kicking the said *Mary Ann Parsons* in and upon the
 head stomach back and sides of her the said *Mary Ann Parsons* in manner and
 form aforesaid while on the ground as aforesaid then and there thereby giv-
 ing to the said *Mary Ann Parsons* divers to wit twenty mortal bruises in and
 upon the head stomach back and sides of her the said *Mary Ann Parsons*
 of which said mortal bruises so caused as aforesaid the said *Mary Ann*
Parsons from the said first day of *January* in the year of our Lord 1850 until

the fourth day of *January* in the year our Lord 1850 then and there to wit at the parish aforesaid in the county aforesaid did languish and languishing did live on which said fourth day of *January* in the year last aforesaid the said *Mary Ann Parsons* at the parish aforesaid in the county aforesaid of the said mortal bruises so given as aforesaid died. And to the said *Robert Courtice Bird* and *Sarah* his wife the said *Mary Ann Parsons* in manner and form aforesaid by the means aforesaid feloniously wickedly wilfully and unlawfully and of their malice aforethought did kill and murder against the peace of our lady the Queen her crown and dignity.

And they the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* further say that the said felony and murder so charged upon them in the said last mentioned indictment as aforesaid included divers assaults therein supposed and alleged to have been made and committed by them the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* against the person of the said *Mary Ann Parsons* in the said indictment named. And they the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* further say that they did then and there respectively plead not guilty to the said last mentioned indictment and that they were thereupon then and there in due form of law respectively tried upon the said last mentioned indictment by a jury of the said county then and there in due form of law summoned impanelled and sworn to speak the truth of and concerning the premises in the said last mentioned indictment mentioned and to try the said issues so joined between our sovereign lady the Queen and them the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* respectively as aforesaid and which said jury upon their oaths did then and there say that they the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* respectively were not guilty of the premises in the said last mentioned indictment specified and charged on them respectively as aforesaid as they the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* by their pleas to the said last mentioned indictment respectively alleged whereupon it was then and there considered by the said last mentioned Court that the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* of the premises aforesaid in the said last mentioned indictment specified and charged on them respectively as aforesaid should be discharged and go acquitted thereof without day as by the record of the said proceedings now here *appears. And they the said *Robert Courtice Bird* and the said *Sarah* the said wife of the [*230 said *Robert Courtice Bird* further say that they the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* now here pleading and the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* in the indictment aforesaid named and thereof acquitted as aforesaid are respectively the same identical persons respectively and not other different persons respectively and that the said *Mary Ann Parsons* in the said last mentioned indictment named is the same identical *Mary Ann Parsons* as is named in the indictment to which they the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* are now here pleading and that the said assaults so included in the said felony and murder so charged upon them the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* in the said indictment in this plea mentioned in this

behalf and therein supposed and alleged to have been made and committed by them against the person of the said *Mary Ann Parsons* as aforesaid are the same identical assaults beatings ill-treatings and woundings respectively as in the said indictment to which they the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* are now here pleading are respectively supposed and alleged to have been made done given and committed respectively by them the said *Robert Courtice Bird* and the said *Sarah* the said wife of the said *Robert Courtice Bird* respectively and not other or different. Wherefore they pray judgment of the Court here whether our said lady the Queen will or ought further to prosecute impeach or charge them on account of the premises in the indictment to which they are now here pleading contained and specified and whether they ought further to answer thereunto respectively and that they may be dismissed this Court without delay.

REPLICATION.

That they were not acquitted of felony and murder including the same identical assaults beating ill-treating and wounding as in the indictment to which the said *R. C. Bird* and *Sarah* his wife have now pleaded. *Modo et formâ.*

Note.—The judgments of all the learned Judges in this case have been printed *verbatim* from copies kindly supplied by their Lordships to the Editor, with the exception of *POLLOCK C. B.*, and that of *MAULE J.*; which latter was not put into writing by his Lordship. These two have been printed from the short-hand writer's notes furnished to the editor by *Mr. Gurney*.

In the judgment of *ALDERSON B.*, there are two or three passages printed between brackets, which it is believed formed part of the judgment as delivered by his Lordship, though they do not appear in the judgment as written.

[On an indictment where a jury may find the defendant guilty of a lesser offence than is charged, an acquittal for the greater crime is a bar to a subsequent indictment for the lesser. The same individual may, however, at the same time and in the same transaction, commit two or more distinct crimes and an acquittal of one is not a bar to the indictment for the other. Thus to an indictment for an assault on A. with intent to murder, an acquittal on an indictment for the murder of B. cannot be pleaded in bar, the transactions inducing the indictment being alleged to be identical. *The State v. Standifer*, 5 Porter, 523. A trial and acquittal for robbery is a bar to an indictment for larceny, where the property alleged to have been taken is the same. *The People v. McGowan*, 17 Wend. 386. Where one was convicted of arson in burning a dwelling-house, which was not a capital offence, and was indicted also for murder by the burning to death of a person in the house, which was a capital crime, it was held that such conviction was a bar to the second indictment. *The State v. Cooper*, 1 Green, 362. On a plea of former acquittal the true test to determine whether the accused has been put in jeopardy for the same offence is, that the facts alleged in the second indictment, if proved to be true, would have warranted a conviction on the first indictment. *Price v. The State*, 19 Ohio, 423.]

*REGINA v. WILLIAM DAVIS.

[*231]

Coram,

Lord CAMPBELL C. J.

ALDERSON B.

COLERIDGE J.

PLATT B.

TALFOURD J.

In an indictment for larceny, the property stolen was laid as belonging to *Darius Christopher*. The prosecutor, when called, said that his name was *Trius*.

Held, that it was entirely a question for the jury whether the two names sounded alike; and, therefore, as it had been treated at the trial as a question of law for the Judge, the conviction was quashed.

UPON the trial for a felony of *William Davis*, at the Quarter Sessions held at *Dorchester* on the 31st of *December*, A. D. 1850, it appeared that the property alleged to be stolen was stated in both counts of the indictment, (a copy of which is hereunto annexed as a part of the case)(a), to be the property of *Darius Christopher*. A person of the name of *Christopher*, the prosecutor of the charge, was called as a witness, and on being asked what was his Christian name, said it was "*Trius*." It was then objected by the prisoner's counsel that the property had been laid in the wrong person. It was answered, that the rule of law as to *idem sonans* was applicable; and that *Trius* and *Darius*, when pronounced, sounded as the same words. And of this opinion was the Court, and overruled the objection. The trial then proceeded, and the prisoner was found guilty on the second count. The Court did not pass sentence; but reserved the question above mooted for the opinion of this Court. The prisoner was discharged on recognizance of bail to appear

(a) Nothing turned upon the indictment, which was in the ordinary form; the first count was for stealing, the second, for receiving, &c. one spade and one axe of the goods and chattels of *Darius Christopher*. It has therefore, been omitted.

*232] and receive judgment at the next Quarter *Sessions in *April*. The question for the Court is,—are the words "*Trius*" and "*Darius*" pronounced so as to produce the same sound? If so, the conviction is to stand; if not, the prisoner is to be entitled to an acquittal.

The following addition was made to the above case by the Chairman of the Quarter Sessions:

This case having been set back (a) for the Chairman of Sessions to state whether it was left to the jury to decide "if the two names sound alike, so as to designate the prosecutor and no one else, thereby distinguishing him from all others, I beg to state, that on my laying down the rule as to names being *idem sonantia*, and the Court being of opinion that the names *Darius* (as pronounced in the *Dorset* dialect *D'rius*) and *Trius* sounded alike, the case proceeded, without its being either expressly or substantially left to the jury to decide as to the question of the names sounding alike; but the jury found their verdict on the facts of the case, and the motion of counsel was *in arrest of judgment*!"

On *Saturday*, 26th *April*, 1851, this case (which had been shortly argued by *Ffookes* on behalf of the prisoner on the 8th of *January*) was considered by the Judges: and the Court held that the conviction must be quashed, as the Chairman had not treated the question respecting the similarity of sound of the two names as a question
*233] of fact for the jury, but as *one of law which it was for him to determine; and this Court could

(a) The following minute was made by the officer of the Court:—"Ordered that this case be sent back to the Chairman of the Sessions, in order that he may state whether it was left to the jury to decide if the two names sound alike so as to designate the prosecutor and no one else, thereby distinguishing him from all others. If it was not *expressly* left to them, was it substantially left to them so as practically to leave the decision of it to them and not to the Court, as it always is a question of fact for the jury, and not for the Judge."

not affirm as a matter of law that the two names sounded alike.

REGINA v. JOHN POYSER.

Coram,

Lord CAMPBELL C. J.

ALDERSON B.

PLATT B.

COLERIDGE J.

TALFOURD J.

A. employed by *B.*, a tailor, to sell clothes for him about the country, was entrusted with a parcel of clothes on the following terms :—*B.* fixed the price of each article, and *A.* was to sell each at that price, and to bring back the money and any unsold clothes to *B.*, and he was to have three shillings in the pound for his trouble. *A.* pawns some, and then fraudulently appropriates the rest. *Held*, that such appropriation was larceny.

THE prisoner was tried before Mr. Baron ALDERSON, for larceny, at the Spring Assizes, A. D. 1851, for the county of *Leicester*. It appeared at the trial that the prisoner was employed by the prosecutor, who was a tailor, to sell clothes for him about the country, and upon the following terms :—The prosecutor fixed the price of each article, and the prisoner was intrusted to sell them at that fixed price, and when he had done so he was to bring back the money and the remainder of the clothes unsold, and was to have three shillings in the pound on the moneys received for his trouble. On the 12th of *February* last he took away a parcel of clothes upon these terms, and instead of disposing of them according to the above arrangement, he fraudulently pawned a portion of them for his own benefit, and having so done he afterwards fraudulently appropriated the residue to his own use. These facts having appeared, the learned Baron directed the jury, that the original bailment of the goods

*234] by the prosecutor *to the prisoner was determined by his unlawful act in pawning part of them, and that the subsequent fraudulent appropriation by the prisoner of the residue of the goods to his own use would in point of law amount to larceny. Upon this direction the prisoner was found guilty, and the question for this Court was, whether this direction was right.

On the 26th of *April*, this case was argued by *O'Brien*, for the prisoner.

The contract with the prisoner was distinct and separate with regard to each article entrusted to him. The fact of his receiving all the articles at one time was a mere accident, which makes no legal difference in the case: each article had a separate price affixed to it. After he had pawned some of the articles, when was the original bailment of the others determined?

LORD CAMPBELL.—The case states, that on the 12th of *February*, he took away a *parcel of clothes*; we must, therefore, regard the delivery of that parcel as one bailment of all the articles contained in the parcel.

O'Brien. The prisoner had authority to break the bulk; the contract imposed on him the necessity of opening it in order to take out each article, and deal with it separately.

COLERIDGE J.—Why may not there be a single contract embracing several particulars, as for instance, where a carrier is entrusted with various articles to leave at different places, all of which articles are placed in one bag; if he wrongfully deals with any one, is it not a breaking bulk of the whole?

O'Brien. The doctrine of breaking bulk turns on there
*235] being no authority to open the parcel, and *deal with any of the articles separately from the rest.

ALDERSON B.—If you can make out this to be like the case of a carrier entrusted with several parcels under several distinct contracts, then certainly it is no larceny.

Lord CAMPBELL C. J.—I think the conviction was right. The case must be considered as though it was a single bailment. If there had been several bailments, then the wrongful dealing with one of the articles so bailed would not affect the case as to any other article. But it makes no difference, that in one parcel there were several articles. The law has resorted to some astuteness to get rid of the difficulties that might arise in the case of a wrongful dealing with one or more of several articles, all of which, when entrusted, had been contained in one bulk.

ALDERSON B. and PLATT B. concurred.

COLERIDGE J.—The fact of different prices being affixed to each article makes no difference in the case.

[If several packages of goods be delivered to a common carrier to be transported in a body, as for instance, a wagon load, an abstraction of one entire package constitutes a taking in the sense of larceny. *Commonwealth v. Crown*, 4 Mass, 580. Where a miller having received barilla to grind, fraudulently retained part of it, returning a mixture of barilla and plaster of Paris, it was held to be larceny. *The Commonwealth v. James*, 1 Pick. 475. See *The State v. Thurston*, 2 McMullan, 282.]

REGINA v. WILLIAM POTTER.

Coram.

Lord CAMPBELL C. J.

ALDERSON B.

COLERIDGE J.

PLATT B.

TALFOURD, J.

What is a *counting house*, under stat 7 & 8 Geo. 4, c. 29, s. 15 ?

THE prisoner was tried before Mr. Justice CRESSWELL,

at the *Liverpool* Spring assizes, for breaking and entering the counting-house of *David Gamble*, at the parish of *236] *Prescot*, and stealing therein, five *hundred pennies, &c., the moneys of the said *David Gamble*.

It appeared in evidence, that *David Gamble* was the proprietor of extensive chemical works at *Prescot*, and that the prisoner broke and entered a building, part of the premises of *David Gamble*, which was commonly called the machine-house, and stole therein, a large quantity of copper money. In this building there was a weighing machine, at which all goods set out were weighed, and one of *Gamble's* servants kept in that building a book, in which he entered all goods weighed and sent out. The account of the time of the men, employed in different departments, was taken in that building, and their wages were paid there. The books in which their time was entered, were brought to that building, for the purpose of making the entries and paying the wages. At other times they were kept in another building called the office, where the general books and accounts of the concern were kept. It was objected for the prisoner, that the building broken and entered by him, was not properly described as a counting-house. The jury found the prisoner guilty, and the learned Judge abstained from passing any sentence, wishing to have the opinion of this Court on the question :—

Whether the prisoner could be punished for breaking and entering a counting-house, and stealing therein, or for simple larceny only.

In the mean time he remained in custody.

On *Saturday*, 26th *April*, Lord CAMPBELL C. J. said, that the Court were unanimously of opinion, that there was abundant evidence to shew that this was a counting-

house, and, therefore, came within the provisions of stat. 7 & 8 Geo. 4, c. 29, s. 15.(a)

*REGINA v. HALLETT.

[*237]

Coram,

Lord CAMPBELL C. J.

ALDERSON B.

COLERIDGE J.

PLATT B.

TALFOURD J.

A., a defendant in a suit tried before a County Court Judge, gave false evidence before an arbitrator to whom the suit was referred, and by whom *A.* was sworn.

Held, that under stat. 9 & 10 Vict. c. 95, s. 77, the arbitrator had no authority to administer an oath, and, therefore, *A.* was not liable to be indicted for perjury.

THE prisoner was tried before Mr. Justice TALFOURD, at the *Gloucester* Spring Assizes, A. D. 1851, for perjury committed before an arbitrator, on an arbitration, directed by order of the Judge of a County Court, and assent of the parties, pursuant to the 77th section of the 9 & 10 Vict. c. 95. The oath was administered, in the usual form, by the arbitrator appointed.

It was objected for the prisoner, that the arbitrator had no power, either under the County Court Act or otherwise, to administer the oath, and that, neither by that act or otherwise, was a party sworn and giving evidence on such arbitration, made liable to the pains of perjury.

The prisoner was found guilty: The learned Judge respited the judgment, and reserved the following question for the opinion of this Court,—Whether an indict-

(a) No Counsel appeared on either side.

ment for perjury will lie in respect of an oath so taken and evidence so given?

On the 26th *April*, this case was argued by *Skinner* for the prisoner, and *MacMahon* for the Crown.

Skinner. The fact of the prisoner being a defendant in the suit, and therefore one of the parties, seems to make no difference in the case.

*Lord CAMPBELL C. J.—That circumstance does
*238] not at all affect the question.

Skinner. Prior to the stat. 3 & 4 *Wm.* 4, c. 42, an arbitrator had no power to administer an oath, (*Watson on Awards*, p. 103, 2nd ed.). Sect. 41, of that act, seems to refer solely to proceedings before the superior Courts, and to have no bearing on cases arising under the County Courts' Act, (stat. 9 & 10 *Vict.* c. 95); so that unless it be by some provision of the act, the arbitrator had here no authority to administer an oath. Sections 69, 77, 83, 84, contain all the provisions that can in any way bear on the subject. The two latter, seem to shew that the oath must be taken before the Judge of the Court, and be administered in Court by the proper officer of the Court; in the same way as witnesses are sworn in Court, before they are examined by a grand jury.

MacMahon for the Crown.

As this was a judicial investigation before an officer appointed under an act of Parliament, the arbitrator had impliedly all necessary authority for the due administration of justice. In very many cases, authority to administer an oath, is given to justices of peace only by implication. (*Burns's Justice*, tit. *Oaths*; *Dalton's Justice*; *Brook. Abr. Exam.* pl. 32.)

ALDERSON B.—Stat. 9 & 10 *Vict.* c. 95, s. 77, only authorizes the Judge to refer the case, and makes a reference irrevocable without his consent; it is, in that respect,

put upon the same footing as a reference by order of Nisi Prius.

The arbitrator's business is, merely to direct how the verdict shall be entered.

MacMahon. A Judge, sitting at Nisi Prius, has no power expressly given him to administer an oath; it is only incidental to his office.

*COLERIDGE J.—How do you distinguish this case from the practice before an arbitrator prior [*239 to the passing of stat. 3 & 4 Wm. 4, c. 42?

Lord CAMPBELL C. J.—There is no doubt about this case. The arbitrator clearly has no power to administer an oath, unless it is given to him impliedly by stat. 9 & 10 Vict. c. 95, s. 77; but that section only enables the Judge to refer matters to arbitration; it gives no power to the arbitrator, other than those which an arbitrator had before the passing of stat. 3 & 4 Wm. 4, c. 42. And at that time no one had authority to administer an oath, unless it were given to him by express statute, or he were sitting judicially, according to the course of the common law. In *Groenvelt v. Burwell*, 1 Ld. Raym. 472, Lord Holt is reported to have intimated an opinion, that where judicial power is given to persons by statute, they may by consequence of law administer an oath. I am unwilling to state anything, as certain, which Lord Holt thought doubtful; but that question is not involved in the case before us.

COLERIDGE J.—It must be understood, that our judgment does not turn on the fact of the present defendant having been one of the parties to the suit.

The rest of the Court concurred.

*240] *REGINA v. MARY ANN BENNETT.

Coram.

Lord CAMPBELL, C. J.

ALDERSON B.

PLATT B.

COLERIDGE J.

TALFOURD J.

Indictment for perjury :

Held, to contain sufficient averments of the identity of the party, respecting whom the perjury was committed.

Mary Ann Bennett was tried before TALFOURD J. at the Spring Assizes for the county of *Gloucester*, A. D. 1851, on an indictment charging her with wilful and corrupt perjury, committed on the trial at the *Gloucester* Spring Assizes, A. D. 1850, of *Shadrack Lewis* and *Isaac Hopkins* for a rape upon herself.

The indictment against *Mary Ann Bennett*, after stating the trial and the oath taken by the prisoner as a witness in the usual form, proceeded thus to allege the materiality of the matters assigned as perjury, and the prisoner's evidence to which the assignments were applicable :

“ That upon the trial of the said indictment the following questions became and were material, and each of them respectively became and was a material question, whether or not the said *Mary Ann Bennett* ever got one *Milo Williams* to write a letter for her; and whether or not she the said *Mary Ann Bennett* saw the said *Milo Williams* at the house of the father of the said prisoner *Shadrack Lewis* when the said letter was written; and whether or not she ever saw the said *Milo Williams* at the house of the said father of the prisoner *Shadrack Lewis*; and whether or not she ever saw the said *Milo Williams* in any house; and whether or not she ever saw

the said *Milo Williams* *more than once; and whether or not the said *Shadrack Lewis* and the said [**241 Isaac Hopkins*, or either of them, violently, feloniously, and against the will of the said *Mary Ann Bennett*, ravished her.

“That the said *Mary Ann Bennett* being so sworn, &c., then and there on the said trial, upon her oath aforesaid falsely, corruptly, and wilfully, &c., did depose and swear (amongst other things) in substance and to the effect following, that is to say, that she (meaning the said *Mary Ann Bennett*) never got a Mr. *Milo Williams* (he the said *Milo Williams* being then present in Court during the said trial) to write a letter for her, and that she (meaning the said *Mary Ann Bennett*) did not see the said Mr. *Milo Williams* at the house of the father of the said prisoner *Shadrack Lewis*, when the said letter was written, and that she (meaning the said *Mary Ann Bennett*) never saw the said Mr. *Milo Williams* at the said house of the said father of the said prisoner *Shadrack Lewis*, and that she (meaning the said *Mary Ann Bennett*) never saw the said *Milo Williams* in any house, and that she (meaning the the said *Mary Ann Bennett*) never saw the said *Milo Williams* more than once; and that the said *Shadrack Lewis* and *Isaac Hopkins* violently, feloniously, and against the consent of the said *Mary Ann Bennett*, ravished her.”

The indictment then proceeded to negative the truth of the matters sworn in these terms:—

“Whereas in truth and in fact the said *Mary Ann Bennett* did get the said *Milo Williams* to write a letter for her,” &c.

and concluded in the usual form.

It was proved that at the trial of *Lewis* and *Hopkins*, the prisoner, then the witness, was asked, on her cross-examination, whether she ever got Mr. *Milo Williams* (who was pointed out to her in Court) to *write a letter for her? That she replied, “No, I did not.” [**242*

That a letter was then exhibited to her, and the question was repeated as to "this letter." That she repeated her denial. She was then asked, "Did you not get Mr. *Milo Williams* to write this letter at *Lewis's* father's house?" She replied, "I did not." She was then asked, "Whether she ever saw *Williams* at *Lewis's* father's house?" She said, "I never did." Again, "Whether she ever saw *Williams*?" She replied, "Once at *Chepstow*; never but once." She was then further asked, "Whether she ever saw *Williams* at her father's house?" She replied, "Not in any house."

The questions were afterwards, in substance, repeated to her by the Judge; but she persisted in the same denials.

She deposed to the perpetration of a rape on her person by both prisoners in succession, each assisting the other.

After the trial of the indictment for perjury, the letter in question, which had been given in evidence to contradict her on the trial for rape, was sworn by *Milo Williams* to have been written at the house of the father of *Lewis* after the committal for rape, by himself, upon her suggestion, read over to her by him, signed by her with her mark, and by him taken away for transmission to *Lewis* in *Gloucester Gaol*. It was as follows.—

" *St. Briavall's Common,*
Jany. 4th 1850.

" *Shadrack Lewis.*

Dear Friend,

"Your master, Mr. *Milo Williams*, called to your father about your unfortunate situation. I have told him I will do all I can to clear you, and I am glad I was at your father's house when Mr. *Williams* called.

*243] I should not have went to the police *about the matter at all if I had not been persuaded by *Betty Wood* and *Nancy Vine*. I had too many backers, or I

should not have troubled about it. If you are as willing as myself when you return, I have no doubt all will be well as it was before. Your father is well.

"I am, yours, &c.

her

"Witness,

"MARY ANN M BENNETT."

"*Milo Williams*.

mark.

Other confirmatory proof of the truth of Mr. *Williams's* statement was given; and the jury found the prisoner guilty on all the assignments of perjury, except on that assigned on the allegation that she never saw *Williams* but once, (which there was no proof to negative), and the assignment on the allegation of rape itself,—the sufficiency of which, therefore, it is not necessary to consider.

For the prisoner it was objected,—

That the materiality of the matters assigned as perjury was not sufficiently alleged in the indictment:

That the reference to the letter was too vague and general, and not properly pointed to the particular letter in question;

That the reference to *Milo Williams*, and to *Lewis's* father's house, were not properly introduced by an averment;

That the letter produced in evidence was not sufficiently identified with the statements on the record to support them.

It was also contended, that the whole transaction of the letter was not sufficiently material to the charge of rape; but the learned Judge thought it clearly was so under all the circumstances in proof before him, and he did not reserve this objection. But he respited the *Judgment, and reserved the other objections for [*244 the opinion of this Court.

On the 26th of *April*, this case was argued by *MacMahon* for the prisoner.

All the assignments of perjury are defective in not identifying the *Milo Williams*, spoken of in the charging part of the indictment, with the *Milo Williams* previously spoken of in the introductory averments. It might have been a material question at the first trial, whether *Ann Bennett* got a particular *Milo Williams* to write a letter, and the answer which is alleged to have been given may have referred to a different *Milo Williams*. The defect consists in the omission of the word "said."

COLERIDGE J.—You say that *Milo Williams* should have been alleged to have been pointed out to her, and that the indictment should have averred the identity of the *Milo Williams* in question with the person so pointed out to her. But the indictment avers that it was a material question, whether she got *any Milo Williams* to write a letter.

LORD CAMPBELL.—I see no ambiguity here; the identity of *Milo Williams* is completely preserved throughout. As to the objection respecting the letter, it is averred to be material whether she got *Milo Williams* to write "a letter;" what letter is alluded to is a matter of evidence, and the letter proved is clearly material.

ALDERSON B.—I am of the same opinion. The indictment comprehends any persons of the name of *Milo Williams*; the description in the indictment is, therefore, larger than the description in the proof; and then the *Milo Williams* in question is identified with the writer of the letter.

*245] COLERIDGE J.—It would have been clearer if the *Milo Williams* in question had been alleged to have been the man who was pointed out to her in Court; and if there had been no other description beyond the name to establish the identity, I am inclined to

think that the indictment would have been bad ; but he is described also as the writer of the letter.

PLATT B. and TALFOURD J. concurred.

REGINA v. WILLIAM FORD, HIGGINSON, AND
MADDOCK.

Coram.

Lord CAMPBELL C. J.

ALDERSON B.

COLERIDGE J.

PLATT B.

TALFOURD J.

In cross-examining a witness for the prosecution, the Counsel will not be permitted to put the witness's deposition into his hand in order that he may read it, and then to ask him, whether having read it he still perseveres in the statement which he has made in Court.

The proper course is to read the deposition to him at the time, and to cross-examine upon it, or to put it in afterwards as evidence for the prisoner.

THE prisoners were tried before *C. S. Greaves*, Esq. Q. C., at the *Stafford Spring Assizes*, A. D. 1851, for a burglary in the dwelling-house of *Edward Johnson*, and stealing therefrom two hams. It was clearly proved that the burglary had been committed by some person or persons, and that a large and small ham had been stolen. The next morning but one after the burglary, *Higginson* and *Maddock* being found in possession of the large ham so stolen, were apprehended. *Maddock*, whilst in custody, made a statement to a policeman, in consequence of which the policeman went with *Maddock* to *Ford*, and asked **Ford* "where the hams were that he had [*246 bought of *Higginson*?" *Ford* at that time denied having any hams, but on the way towards his house he said to the policeman, "I have the *little* ham at home, but I know nothing at all about the *big* ham." The po-

liceman added, that neither he nor *Maddock* had said anything about little or big hams in *Ford's* hearing before *Ford* made this statement. On cross-examination, the policeman was several times asked whether *Maddock* did not say in *Ford's* hearing, when he first met with *Ford*, "that is the man that bought the big and the little ham." which he as often denied. The prisoner's Counsel then proposed to put his deposition into his hand, to desire him to read it, and having done so, to ask him "whether he adhered to the statement, that nothing had been said about the big or little ham in *Ford's* hearing before *Ford* made the statement about them." But the prisoner's Counsel did not propose to put the deposition in evidence. The deposition was signed by the policeman, and contained a statement, that when the policeman met *Ford*, *Maddock* said, "that is the man that bought the big and little ham."

Mr. *Greaves* consulted Mr. Justice *PATTESON*, and finding that he had an impression that the course proposed had been permitted by some of the learned Judges, but that his opinion was opposed to it, and entertaining himself a very decided opinion against such a course, and having on a previous day in the same assizes refused to permit it to be adopted, he thought it better to refuse to permit it in the present instance; but out of respect for the opinion of any learned Judge who might have permitted such a course, and in order that a point so likely to recur at the sessions as well as at the assizes might be finally settled, he reserved the following question for the *247] *opinion of this Court: whether the prisoner's Counsel was entitled, as a matter of right, to put the deposition into the witness's hand, to desire him to read it, and then to ask him whether he adhered to the statements he had made.

William Ford was convicted, and sentenced to twelve calendar months' imprisonment, with hard labour.

On the 25th of *April*, *Powell*, who appeared for the prisoner, was stopped by Lord CAMPBELL C. J., who said that the question was *res judicata*, and he therefore could not allow it to be argued; that PARKE B. had given him a MS. note of a decision which was precisely in point.

The note was as follows: (a)—

"Some cases occurred before COLTMAN J. at *York*, and myself at *Liverpool*, in which the Counsel for the prisoner, on cross-examining a witness for the prosecution, offered to put into his hand his deposition before the magistrate, and then proposed to ask him whether, having looked at the paper, the witness still persevered in the statement already made in his evidence in Court. We had some doubt as to the propriety of this course; but it having been permitted by some Judges, we thought it right to allow it. As it is very desirable that uniformity should prevail in the practice in this respect, I have to request the opinion of the Judges whether we were right. Dated this 28th *April*, 1843. J. PARKE.

"Answer,

"The Judges are of opinion that the course pursued *in this case is inexpedient, and ought [*248 not to be allowed for the future. 29th *April*, 1843.

"DENMAN.	PATTESON.	ROLFE.
TINDAL.	WILLIAMS.	CRESSWELL."
PARKE.	COLTMAN.	
ALDERSON.	ERSKINE.	

Lord CAMPBELL C. J. added, that the proper course was to read the deposition at the time, and then to cross-examine upon it, or to put it in afterwards as the evidence for the party so putting it in.

(a) Copied verbatim from PARKE B.'s copy of *Russell on Crimes*, Vol. I.

ALDERSON B.—The contrary course might open a door to very tricky practice. For instance, suppose the witness to have made precisely the same statement in Court with that contained in his deposition, and the Counsel to put the deposition into his hand, and to ask him whether he still persisted in the statement which he had just made in Court; and the witness to do so; in that case the jury would naturally conclude that the statement and the deposition materially differed, and, unless the deposition was read in Court, they would remain under that false impression, and give their verdict under a complete misconception of the facts.

The rest of the Court concurred.

*249] *REGINA v. SIMON COHEN AND JOHN COLLINS.

Coram,

Lord CAMPBELL C. J.

ALDERSON B.

PLATT B.

COLERIDGE J.

TALFOURD J.

A., bargaining with *B.* about some waistcoats, said, "You must go to the lowest price, as it will be ready money;" *B.* said, "Then you shall have them for twelve shillings," to which *A.* assented. *A.* then said he should put the waistcoats into his gig, which was then standing at the door. *B.* replied "Very well." *A.* drove off with the waistcoats without paying for them, and absconded for two years.

The jury returned the following verdict:—"In our opinion the waistcoats were parted with conditionally, that the money was to be paid at the time, and that *A.* took them with a felonious intent."

Held, a larceny in *A.*

At the General Quarter Sessions of the Peace for the county of *Durham*, held at the city of *Durham*, (before *Rowland Burdon*, Esquire, Chairman), on the 30th day

of *December*, A. D. 1850, the prisoners were indicted for having, on the 10th day of *October*, A. D. 1848, stolen two waistcoats, the property of *Charles Hall Bowser*. The prisoners pleaded not guilty.

On the trial it was proved, that on the said 10th day of *October*, A. D. 1848, the prisoners, *Cohen* and *Collins*, called at the shop of the prosecutor, *Charles Hall Bowser*, who was a tailor, residing at *Chesterle-Street*, and who agreed to make each of the prisoners a suit of clothes, which had to be sent to *Newcastle*.

After giving the order, one of the two prisoners took the prosecutor to a public-house, where he gave him some liquor. After their return to the shop the prisoner *Cohen* asked the price of two waistcoats which were in the window. The prosecutor said they were fifteen shillings. *Cohen* said, "You must go to the lowest price, as it will be for ready *money;" the prosecutor said, "Then you shall have them for twelve [*250 shillings," which was agreed to by the prisoner (*Cohen*).

The prisoners had a gig standing at the prosecutor's shop door, and the prisoner *Cohen* said he would put the waistcoats into the gig, in which *Collins* was sitting, to which the prosecutor replied, "Very well." The evidence proved that *Cohen* had not any money, but that *Collins* had, and when *Cohen* went out to the gig, the prosecutor said he thought he went out to get the money from *Collins*. *Cohen* had, previous to this, asked the prosecutor to lend him thirty shillings.

Immediately after the waistcoats had been placed in the gig, *Cohen* got in, and they drove off full gallop. Upon inquiry next day, it was found that the prisoners had given a fictitious address. From that time, up to *December*, A. D. 1850, the prosecutor had been unable to apprehend the prisoners.

It was contended, on behalf of the defence, that there

was no case to go to the jury, inasmuch as it had been proved by the prosecutor that a complete sale of the goods had taken place, and that he had voluntarily delivered them to *Cohen*.

This was overruled by the Chairman, and the jury found *Cohen* guilty of stealing the waistcoats, and *Collins* not guilty.

Cohen was discharged on bail to appear when called upon to receive the judgment of the Court.

The jury, in answer to the Chairman, said, in their opinion the waistcoats were parted with conditionally, that the money was to be paid at the time, and that *Cohen* took them with a felonious intent.

The question for the opinion of this Court was,—Whether the conviction of *Cohen* for larceny was proper?

*On the 26th of April, *Huddleston*, for the prisoner, said that the only question was, whether the term “conditionally” in the verdict meant that the prosecutor parted with his property in the waistcoats on the condition of being paid for them by the prisoner some time or other,—as if so, it would be no larceny in *Cohen*, but a purchase on credit.

ALDERSON B.—It means that the waistcoats were to belong to the prisoner when the prisoner complied with the condition of paying twelve shillings, and not before.

Lord CAMPBELL C. J.—The goods were clearly taken *animo furandi*. *Collins* was in great luck to get off. This is an express finding of the jury, that the prosecutor only parted with the possession of the goods.

The rest of the Court concurred.

[Obtaining goods by a fraudulent purchase, the vendor delivering them with an intention to part with the property in the goods, in no case constitutes a larceny. *Mowrey v. Walsh*, 8 Cowen, 238; *Ross v. The People*, 1 Hill, 94. It is not constructive larceny to induce one by fraudulent means to part with the property in goods; this description of offence is confined to the possession of goods. *Lewer v. The Commonwealth*, 15 Sergeant & Rawle, 93. Fraudulent pretences and arti-

fices in obtaining another's property *animo furandi* will amount to larceny, provided it does not appear that a temporary trust or possession was extended to the party. *Wilson v. The State*, 1 Porter, 118; *The State v. Gorman*, 2 Nott & McGord, 90.]

REGINA v. CLEMENTS AND ANOTHER.

Coram.

Lord CAMPBELL C. J.

ALDERSON B.

COLERIDGE J.

PLATT B.

TALFOURD J.

Under stat. 11 & 12 *Vict.* c. 42, s. 17, the deposition of a witness, who is so ill as not to be able to travel, may be read in evidence before the grand jury, as well as before the petty jury.

At the General Quarter Sessions of the Peace for the county of *Kent*, on the 31st of *December*, A. D. 1851, a bill of indictment was preferred against *John Clements* and *John Smith* for larceny.

Upon the bill being sent before the grand jury, and the prosecutrix not appearing, they sent for the attorney for the prosecution, and intimated to him that *they could not proceed with the bill, without [*252 having the deposition of the prosecutrix. Whereupon the Counsel for the prosecution applied to the Court that those depositions might be sent up to the grand jury, stating to the Court that the prosecutrix was an aged woman, and too ill, from infirmity to travel to the sessions; that the deposition had been taken by the magistrate, at the dwelling-house of the prosecutrix, in the presence of the prisoners, who had had an opportunity of cross-examining the prosecutrix; and that the depositions were signed by the prosecutrix and the magistrate;

and that the witnesses to prove these facts and the illness of the prosecutrix were in attendance; and that their names were on the back of the bill of indictment; which facts were afterwards proved on the trial, and the depositions of the prosecutrix read in evidence, in pursuance of the stat. 11 & 12 *Vict.* c. 42, s. 17.

Counsel for the prisoner objected to the depositions being sent before the grand jury on the ground that in the absence of the prosecutrix, her depositions were not admissible as evidence before the grand jury, either at common law or by the statute 11 & 12 *Vict.* c. 42, s. 17, which makes it lawful to read such depositions in evidence "*upon the trial*;" and it was contended, that the word *trial*, meant trial before the petty jury, and not the preliminary proceedings before the grand jury. The Court overruled the objection, and ordered the depositions to be sent to the grand jury, who, thereupon, returned a true bill, to which the prisoners pleaded "not guilty," and upon which they were tried, convicted, and sentenced to nine calendar months' imprisonment, in the *House of Correction*, with hard labour.

On the application of the prisoner's Counsel, the Court of Quarter Sessions reserved the following *ques-
*253] tion for the opinion of this Court. Whether, under the circumstances above stated, it was competent to the Court of Quarter Sessions to send the deposition of the prosecutrix before the grand jury, to be read by them as evidence in her absence?

On the 3rd of *May*, Lord CAMPBELL C. J. gave the following judgment. We feel some doubt whether the statute 11 & 12 *Vict.* c. 78, authorizes us in entertaining the question here submitted to us; and we also doubt whether, even if the evidence were not rightly submitted to the grand jury, it would invalidate the conviction.

We are, however, of opinion, that it may be made use of both before the grand jury and the petty jury, because the stat. 11 & 12 *Vict.* c. 42, s. 17, provides that, "*If upon the trial of the person so accused, &c. it shall be proved by the oath or affirmation of any credible witness, that any person, whose deposition shall have been taken as aforesaid, is dead, or so ill as not to be able to travel, and if also it be proved that such deposition was taken in the presence of the person so accused, and that he or his Counsel or attorney had a full opportunity of cross-examining the witness, then, if such deposition purport to be signed by the justice, by or before whom the same purports to have been taken, it shall be lawful to read such deposition as evidence in such prosecution, without further proof thereof, unless it shall be proved that such deposition was not in fact signed by the justice purporting to sign the same.*" We think that the word *trial*, as here used, coupled with the word *prosecution*, was intended to authorize the course that has been here adopted. Therefore, in any view of the case, the conviction must be affirmed.

*REGINA v. SAMUEL HILL.

[*254]

Coram,

Lord CAMPBELL C. J.

ALDERSON B.

PLATT B.

COLERIDGE J.

TALFOURD J.

A lunatic under confinement in a lunatic asylum, is admissible as a witness, if the Judge considers him competent in point of understanding, and to be aware of the nature and sanction of an oath.

The lunatic may be examined and cross-examined, and witnesses called on either side in order to determine the question of competency; but when admitted, it

is for the jury to determine whether his testimony is affected by his insanity, and what degree of weight is to be attached to it.

THIS prisoner was tried before COLERIDGE J., assisted by CRESSWELL J., at the *February* sittings of the Central Criminal Court, 1851, for the manslaughter of *Moses James Barnes*; he was convicted, but a question was reserved for the opinion of this Court, as to the propriety of having admitted a witness of the name of *Richard Donelly* on the part of the prosecution.

The deceased and the witness were both lunatic patients in a Mr. *Armstrong's* Asylum, at *Camberwell*, at the time of the supposed injury, and they were, at that time, placed in a ward called the Infirmary. It appeared that a single sane attendant (the prisoner) had the charge of this ward, in which as many as nine patients slept, and that he was assisted by three of the patients, of whom the witness *Donelly* was one.

It was opened for the prosecution, that the witness *Donelly* was to be called, and, therefore, on both sides, some evidence was gone into in the course of the case; and before he was called, in order to found and to meet the objection to his competency, *Muncaster*, *who *255] had been an attendant in charge of the infirmary ward before the prisoner, stated that "*Donelly* labours under the delusion that he has a number of spirits about him which are continually talking to him; that is his only delusion; he has never been free from it, to my knowledge, since I have known him."

Joseph Stuart Burton, the medical superintendent, stated the same; but added, "I believe him to be quite capable of giving an account of any transaction that happened before his eyes. I have always found him so; it is solely with reference to the delusion about spirits, that I attribute to him being a lunatic: when I have had conversation with him on ordinary subjects, I have found him per-

fectly rational, but for this delusion ; I have seen nothing in his conduct or demeanor in answering questions, other wise than the demeanor of a sane man."

James Hill, a doctor in medicine, who had been formerly a medical superintendent at the same Asylum, stated : " The memory of an insane man is not necessarily affected ; it frequently is, but frequently is not. I have seen *Dr. Haslam's* work. I do not agree in all cases with his remark that 'memory appears to be perfectly defective in cases of insanity ;'—certainly not ; it may probably be so in the generality of cases. Madness is commonly accompanied by a great deal of excitability of the brain, but in some cases it is not ; it is very often accompanied by physical irritation of the brain ; it is one of the most common causes of madness, either primarily or secondarily. In certain cases of acute madness, the ideas in the mind of a madman succeed each other more rapidly than in the mind of a sane man, and in a more confused manner, that is, where there is actual irritation of the brain ; *it is quite possible for a man to entertain a delusion on one subject *without its affecting his mind generally on other subjects* ; in most cases where a delusion prevails, [*256 and the man is mad, the rest of his mind is affected to some extent. I agree with *Dr. Pritchard* in his observation, that ' In monomania the mind is unsound, but unsound in one point only.' There is no doubt, however, that all the mental faculties are more or less affected : but the affection is more strongly manifested in some than in others. It is difficult to ascertain, without strict inquiry, the extent of a madman's delusions ; they have sometimes the power of concealing their delusions, even from their medical attendants, especially after having been frequently conversed with about the delusions, and knowing that they are the cause of their detention,—but it is unfrequent. It is a doubtful point whether what

they say is not for a particular purpose,—for instance, to obtain liberty. If a madman has an object to answer, he is sometimes capable of concealing his delusions; I have known it, but not as a general rule: they are probably capable of a good deal of dissimulation,—many are, I know; but many do not exhibit that tendency. It is common for a certain class of madmen to exhibit a great deal of cunning. *Donelly* laboured under a delusion with respect to spirits; he is in the strict sense of the word, a lunatic, inasmuch as he labours under a delusion; he is not excitable by any means. I have known instances of lunatics concealing their delusions, but in all these cases there is an evident and apparent motive. I have known decided lunatics, not monomaniacs, in what are called lucid intervals, capable of going about and managing their own affairs; *in ordinary cases there is no particular difference between a monomaniac, apart from his particular delusion, and an insane person in a lucid interval*; during *257] the lucid interval of the insane *person, he is well; but a monomaniac is a monomaniac all the time; in the instance of a monomaniac, you produce the insanity the moment you touch the particular chord; it is possible that you might revive insanity in a madman during a lucid interval by touching on the same subject, if it is but recent; I always found *Donelly* perfectly rational except on the subject of his particular delusion.

Donelly was then called, and before being sworn was examined by the prisoner's Counsel. He said, "I am fully aware that I have a spirit, and twenty thousand of them; they are not all mine; I must inquire—I can where I am; I know which are mine. Those ascend from my stomach to my head, and also those in my ears; I don't know how many they are. The flesh creates spirits by the palpitation of the nerves and the 'rheumatics;' all are now in my body and round my head; they

speak to me incessantly,—particularly at night. That spirits are immortal I am taught by my religion from my childhood, no matter how faith goes: all live after my death, those that belong to me and those which do not; Satan lives after my death, so does the Living God." After more of this kind, he added, "They speak to me constantly; *they are now speaking to me*; they are not separate from me; they are round me, speaking to me now; but I can't be a spirit, for I am flesh and blood; they can go in and out through walls and places which I cannot. I go to the grave, they live hereafter,—unless, indeed, I've a gift different from my father and mother that I don't know. After death my spirit will ascend to Heaven or remain in Purgatory. I can prove Purgatory. I am a Roman Catholic; I attended *Moorfields, Chelsea Chapel*, and many other chapels round *London*. I believe Purgatory; *I was taught that in my childhood and infancy; I know what it is to take an oath; my Catechism taught me from my infancy when it is lawful to swear; it is when God's honour, our own or our neighbour's good require it. When man swears, he does it in justifying his neighbour on a Prayer Book or obligation. My ability evades while I am speaking, for the spirit ascends to my head. When I swear, I appeal to the Almighty; it is perjury the breaking a lawful oath or taking an unlawful one; he that does it will go to hell for all eternity." [*258

He was then sworn, and gave a perfectly connected and *rational account of a transaction which he reported himself to have witnessed*. He was in some doubt as to the day of the week on which it took place, and on cross-examination said, "These creatures insist upon it it was Tuesday night, and I think it was Monday;" whereupon he was asked, "Is what you have told us what the spirits told you, or *what you recollect without the spirit?*" and

he said, "*No; the spirits assist me in speaking of the date; I thought it was Monday, and they told me it was Christmas Eve—Tuesday; but I was an eye witness, an ocular witness to the fall to the ground.*"

The question for the opinion of this Court was, whether *Richard Donelly* was a competent witness?

This case was argued on the 3d May, 1851. *Collier* appeared for the prisoner; Sir *F. Thesiger*, *Bodkin* and *Clarkson* for the Crown.

Collier. 1. The witness, *Donelly*, was *non compos mentis* in point of fact, according to the medical and legal authorities on that subject. 2. It is a rule, that no person who is *non compos mentis* is admissible as a witness. 3. *259] There are reasons of public policy, as *well as of convenience, against qualifying this rule. 4. Even should the above rule be qualified, this case could not be brought within such qualification.

1. *Donelly* was a pauper lunatic, whose lunacy had been certified by medical men and adjudicated by magistrates; and if sane, he would have been discharged by the Commissioners. (Stat. 8 & 9 Vict. c. 100, ss. 45, 76. 77; *Ibid.* c. 126, s. 51). He was labouring under an insane delusion, from which he was never free: he was, in the strict sense of the word, a lunatic. (*Dew v. Clark*, Beck Med. Jurisprud. 430, 472, 6th ed.; 1 *Addams's Rep.* 279; 2 *Id.* 102; 3 *Id.* 79).

He was a lunatic without a lucid interval, both at the time when the event happened of which he was speaking, and also at the time of the trial.

2. The authorities shew that a *non compos* is inadmissible. (Com. Dig. tit. Testmoigne—Witness, A 1). There are two heads of incompetency, to which all others may be referred: First. Want of sufficient understanding to tell the truth; Secondly. Want of trustwor-

thiness in a person of sufficient understanding. A *non compos* comes under the first head. Infidels, infamous persons, parties to the suit, &c., under the second. A child's incompetency is not put so much on his want of religious knowledge, as on his being *non compos*: until his reasoning powers and his religious instincts are sufficiently developed, he is *non compos*; but when they are so far developed as to enable him to understand the nature of an oath, he is no longer regarded as *non compos*. But knowledge of the nature of an oath is no test of a lunatic's competency; he may understand the nature of an oath, yet labour under the most extravagant delusions. No such classification has ever been attempted as that of lunatics who understand the nature of an oath, and *lunatics who do not. A lunatic, while not in a lucid interval, is always supposed to be *non compos*; he has a fully developed intellect, though distorted and insane: a child, on the other hand, has a sane intellect, though only partially developed. Neither *Comyn* nor *Buller* (see N. P. 283 (a), 293) mention any qualification of the general proposition than an insane person is inadmissible, except *in lucidis intervallis*,—i. e., when he is not insane at all; for in the matter of evidence no degrees of lunacy are recognised by the law. (*Co. Lit.* 6 (a); *Id.* 247 (a)).

In *R. v. Eriswell*, 3 T. R. 712, where a pauper, who had been examined, afterwards became insane, *BULLER J.* said, "I consider the pauper as dead, he being in such a state as renders it impossible to examine him." Therefore, where it is stated generally that a man is insane, it is assumed that he could not have been examined.

LORD CAMPBELL C. J.—In that case it was assumed, that owing to the extent of the insanity the pauper was not in an examinable state.

Collier referred to *Currie v. Child*, 3 Campb. 283; *Bennett v. Taylor*, 9 Ves. Jun. 381.

LORD CAMPBELL C. J.—The question is in what sense the word insane is there used. If it means only a delusion, they are in your favour. If it means total insanity, they are not?

ALDERSON B.—The question is, was he *non compos mentis quoad hoc*, or *non compos mentis* altogether?

Collier referred to *Alison's Pr. of Law in Scotland*; *Burnet on Cr. Law in Scotland*; and the Civil and Canon Laws.

LORD CAMPBELL C. J.—It is singular that the Civil Law which, generally speaking, is a near approach to the perfection of human reason, should be very defective on the subject of evidence.

*261] *COLERIDGE J.—It is impossible to take rules of evidence from the Canon Law. It is there declared, “A judiciis omnibus tanquam minus apti et idonei ad ferendum testimonium, repelluntur furiosi, amentes, itemque *impuberes, servi*, perjuri, infames, *excommunicati*. Quin jure decretalium quilibet reus criminia postulatus, etiamsi nondum confessus, convictus, damnatus et notatus infamiâ sit, testimonium dicere prohibetur, exceptis gravioribus criminibus, qualia sunt simoniæ et læsæ majestatis in quibus etiam *infames* testimonium ferunt. Nam testes non tantum infamiâ sed etiam infamiæ suspicione vacare oportet.” (Institut. *J. Devoti*, tit. de Probationibus, XIII.)

“In certis causis testimonium ferre nequeunt foeminæ in causis criminalibus, nisi planè alius desit veritatis ostendendæ locus, ac nisi agatur de gravioribus criminibus simoniæ et læsæ majestatis, in quibus etiam minus idonei testes recipiuntur.” (Ibid. T. XIV.) . . . “Similiter neque amici testimonium dicunt in causis amicorum.” (Ibid. T. XV.)

3. If it be said that this rule is too general, and that as the law recognises degrees of lunacy with reference to other subjects, it should also recognise degrees in the matter of testimony; this broad distinction seems to exist in the very nature of things; viz., that it is comparatively easy to test madness with reference to a *past* act, but not so with reference to a *future* act. How can a Judge say whether a witness's whole evidence may not be based on delusion, or that the delusion will not come on while he is giving his evidence? Is every insane witness to be admissible, and his credit left to the jury? That is contrary to all the authorities. If not, what classes of insane persons are to be admitted? Monomanics only? What is monomania? Its existence is denied by some medical writers. It seems, therefore, that as *soon as the unsoundness of mind is manifested, the [*262 inquiry should stop, otherwise the Judge would have to perform the almost impossible task of determining the precise nature and extent of the insanity, and whether it will affect the evidence of the witness at any period of the trial, and under any circumstances that may take place during its progress.

Lord CAMPBELL C. J.—You admit that it is for the Judge to decide. You must, therefore, go the length of saying, that the Judge is bound to disallow the testimony of any person who is under any insane delusion. In a case tried before PARKE B., it was held that it was for the Judge to decide the question of competency, and for the jury to decide the question of credibility.

Collier, 4. Even though the rule should be thought subject to qualification, this case would not fall within the qualification. On his cross-examination, the witness said that spirits were then talking to him on the very subject on which he was called to give evidence.

Lord CAMPBELL C. J.—What you got out on cross-

examination was for the jury, not for the Judge. You cannot avail yourself of anything that took place after the insane person was sworn.

Sir *F. Theigier* was not called upon.

Lord CAMPBELL C. J.—The question is important, and has not yet been solemnly decided after argument. But I have no doubt that the rule was properly laid down by PARKE B. in the case which was tried before him, and that it is for the Judge to say whether the insane person has the sense of religion in his mind, and whether he understands the nature and sanction of an oath; and then the jury are to decide on the credibility and weight of his evidence. As to the authorities that have been *263] cited, *the question is, in what sense the term "*non compos*" was there used. A man may, in one sense, be *non compos*, and yet be aware of the nature and sanction of an oath. In the particular case before the Court, I think that the Judge was right in admitting the witness; I should certainly have done so myself. One witness (*Burton*) says, "I believe him to be quite capable of giving an account of any transaction that happened before his eyes; I have always found him so: I have found him perfectly rational but for this delusion."

Another witness (*Hill*) says, "It is quite possible for a man to entertain a delusion on one subject without its affecting his mind generally on other subjects." . . . "I always found *Donelly* perfectly rational, except on the subject of his particular delusion." It has been argued that any particular delusion, commonly called monomania, makes a man inadmissible. This would be extremely inconvenient in many cases in the proof either of guilt or innocence: it might also cause serious difficulties in the management of lunatic asylums. I am, therefore, of opinion that the Judge must, in all such cases, determine the competency, and the jury the credibility.

Before he is sworn, the insane person may be cross-examined, and witnesses called to prove circumstances which might shew him inadmissible; but, in the absence of such proof, he is *prima facie* admissible, and the jury must attach what weight they think fit to his testimony.

ALDERSON B.—I quite agree. In this case the lunatic seems to have been perfectly acquainted with the nature and sanction of an oath.

COLERIDGE J.—Mr. *Collier* has referred to several *dicta* in which the rule is stated without any qualification; but in those cases no qualification was needed. *In [*264 old times, too, the rules of evidence were much narrower than at present, and more in accordance with those of the Civil and Canon Laws. In this case the evidence shewed that the insane person had only a single delusion; as to memory he was like other people; and with regard to the obligation of an oath he was unusually well instructed. *Primâ facie*, therefore, he was quite fit to be sworn. If, however, in the course of the trial, he shewed his evidence to be tainted with insanity, then the jury should have attached no weight to it.

PLATT B. concurred.

TALFOURD J.—It would be very disastrous if mere delusions were held to exclude a witness. Some of the greatest and wisest of mankind have had particular delusions.

Lord CAMPBELL C. J.—The rule which has been contended for would have excluded the testimony of *Socrates*, for he had one spirit always prompting him.

[It is no objection to the competency or credibility of a witness that he is subject to fits of derangement, if he is sane at the time of giving his testimony. *Evans v. Hettich*, 7 Wheaton, 453.

Idiots, lunatics, and madmen are not competent witnesses. *Livingston v. Hiersted*, 10 Johns. 362; *Armstrong v. Timmons*, 3 Harrington, 342.

To exclude a witness from testifying, as being *non compos*, or an idiot, the fact must be proved by other testimony, and not by a preliminary examination of the

witness; and even if the court have any discretion, by which they may permit such preliminary examination, still it is not error for them to refuse to allow it. *Robinson v. Dana*, 16 Vermont, 474.]

REGINA v. GEORGE ODDY.

Coram.

LORD CAMPBELL C. J.

ALDERSON B.

PLATT B.

COLERIDGE J.

TALFOURD, J.

On the trial of an indictment, containing counts for stealing, and for receiving the property of A. knowing it to be stolen, evidence of the possession, by the prisoner, of other property stolen from other persons at other times is not admissible to prove either the stealing or the receiving.

THE defendant was indicted for felony, at the *Leeds* Borough Sessions, holden before the Recorder of that borough, *on the 3d of *April*, A. D. 1851. The *265] indictment contained three counts. The first count charged the defendant with breaking a warehouse, and stealing therein, on the 3d of *March*, A. D. 1851, fifty yards of woollen cloth, value 10*l.*, the property of *Isaac Boocock* in the said warehouse; the second count charged a simple larceny of the same property, on the same day and year; the third count charged that the defendant, on the same day and year, feloniously received the same property, knowing it to have been stolen.

To all these counts, the defendant pleaded not guilty, and issue was joined on the part of the Crown.

At the trial, it was proved that the cloth mentioned in the indictment, had been stolen in the night, between the 2nd and 3rd of *March*, A. D. 1851, from a mill, and was the property of the party named on that behalf in the indictment. It was further proved, that the defendant was found in possession of it on the 10th of *March*,

A. D. 1851, under circumstances which, it was suggested, shewed an attempt to conceal the possession. It was further proved, that the defendant, upon the cloth being discovered in his possession, declared that he had obtained the cloth from a woman, who was called as a witness at the trial, on the part of the prosecution and who swore that it had not been obtained from her.

The Counsel for the prosecution proposed further to prove, that the defendant's house had been searched within an hour after the property named in the indictment was found in his possession, and that upon this search, two other pieces of cloth were found in the house; and also that on the 13th of *December*, A. D. 1850, the defendant had been in possession of two more pieces of cloth, and that these four pieces of cloth *had [*266 been stolen in the night between the 4th and 5th of *December*, A. D. 1850, from another mill, and were the property of different owners, no one of whom was connected with the owner of the cloth mentioned in the indictment.

The Counsel for the defendant objected to the reception of this evidence;

First, on the ground that it was not receivable in support of either of the first two counts, and could, therefore, not be given, unless those counts were abandoned.

Secondly, on the ground that considering the evidence, with reference only to the third count, it was not receivable, inasmuch as it did not appear, and was not suggested that any of the four pieces of cloth were delivered to the defendant, or stolen by the person who delivered to the defendant, or stole the cloth mentioned in the indictment; and that it did appear that two of the four pieces had not been received by the defendant at the same time, or stolen at the same time, or from the same person as the cloth mentioned in the indictment; and

that it did not appear when the other two pieces were received by the defendant; but did appear that they were not stolen at the same time, or from the same person with the cloth mentioned in the indictment.

The Recorder received the disputed evidence without requiring an abandonment of either of the first two counts, and in summing up, told the jury not to apply it to either of the first two counts; but he told them that it was evidence of guilty knowledge under the third count, without desiring them not to take it into consideration, unless they believed that the four ends of cloth, or some or one of them, were or was delivered to the defendant, or stolen by the person who delivered to the defendant the cloth mentioned *in the indictment, *267] or that any of the four pieces of cloth was delivered to the defendant at the same time, or stolen from the same person, with the cloth mentioned in the indictment.

The jury found the defendant not guilty on the first count; not guilty on the second count; guilty on the third count.

The defendant was sentenced to be transported for seven years, but execution of the judgment was respited, and the defendant committed to prison until the questions hereafter mentioned should have been considered and decided.

The questions for the opinion of this Court are, whether, under the circumstances above mentioned,—

First, the disputed evidence was receivable;

Secondly, whether the direction to the jury was correct.

On the 3d *May*, this case was argued by *Pickering* for the Crown.

The evidence was admissible. The present case, no

doubt, differs in some respects from the former cases, where evidence of the receiving or of the possession of other stolen articles has been admitted on an indictment for receiving stolen goods, in order to prove the guilty knowledge. In *R. v. Dunn*, 1 Moo. C. C. 150 the other articles were shewn to have been stolen from the same person, and to have been received by the prisoner, though at different times, yet from the same person. In *R. v. Davis*, 6 C. & P. 177, evidence was given of the possession by the prisoner of other articles, but they had all been stolen from the same person.

ALDERSON B.—In *R. v. Sirrell*, tried before my Brother TALFOURD and myself at *Liverpool* the last Winter Assizes. there was evidence of other stolen *articles being found in the house, and that circumstance was [*268 offered in evidence on the part of the prosecution, but we rejected it.

Pickering. In *R. v. Mansfield*, C. & M. 140, the possession by the prisoner of other articles, found under circumstances which raised a presumption that they were stolen, was allowed to be proved, though it was not shewn from whom they were stolen.

COLERIDGE J.—You cannot shut out evidence of any other property having been found in the possession of the prisoner at the time of a search being made.

Pickering. The property here, to which the evidence objected to related, was shewn to have been in the possession of the prisoner; but the question is, whether you may not go further, and prove that such property was stolen.

ALDERSON B.—May you not as well contend that on an indictment for burglary, which necessarily avers an intent to steal, (or to do some felonious act), you may shew that the prisoner committed another burglary, in order to shew his intention to steal, &c.?

Pickering. The two cases are quite distinct: there it is a question of *intention*, and you infer the intention from the act itself; that is to say, from the breaking and entering the house at night you infer the intention to steal: here it is a question of *knowledge*, which you cannot infer from the act of receiving alone, but must gather it from other and independent circumstances. It must be conceded that the *moral* weight of such evidence is irresistible. Suppose a thousand articles, all stolen at different times, either from the same or different persons, and all of them to be found in the possession of the prisoner, could any one doubt that he received them with a guilty knowledge?

*269] *Lord CAMPBELL C. J.*—The moral weight of such evidence, in any individual case, would no doubt be very great; but the law is a system of general rules; and it does not admit such evidence, because of the inconvenience which would result from it.

Pickering. But in several analogous cases the law does admit such evidence, notwithstanding the inconvenience; and there the inconvenience, which is confessedly the only ground of exclusion, is tolerated in order that justice may not be defeated. The inconvenience is put upon two grounds; First, that of the prisoner being taken by surprise; Secondly, of many different issues being raised.

Lord CAMPBELL C. J.—Yes. That is so.

Pickering. As to the ground of surprise, that arises, if at all, from the doctrine of election, which has prevailed of late years: formerly, and it may still be done legally, the indictment might contain many distinct felonies, of which, if charged in the indictment, the prisoner would thus have full notice. But if that course were adopted now, the Court would probably quash the indictment; at all events, since the prosecutor is always called upon to

make his election, such a course is never adopted. This point was fully discussed in *Whiley's case*, 2 Leach, 983 ; S. C. 1 New R. 92 ; 1 Greaves's Russell, 80. That was an indictment for uttering a forged Bank note in *March*, 1804, and to prove the guilty knowledge, former utterings, on 13th *February*, 25th *February*, 28th *February*, 1804, were offered in evidence. All the argument, from the inconvenience of admitting such evidence, were urged ; but Lord ELLENBOROUGH C. J. said, "The observations respecting prisoners being taken by surprise, and coming unprepared to answer or defend themselves against extrinsic facts is not correct. The indictment alleges that the *prisoner uttered this note knowing it to be forged, and they must know that, without the re- [*270
ception of other evidence than that which the mere circumstances of the transaction itself would furnish, it would be impossible to ascertain whether they uttered it with a *guilty knowledge* of its having been forged, or whether it was uttered under circumstances which shewed their minds to be free from that guilt.

ALDERSON B.—But here one robbery was in *March*, and the other in *December* previous. Can you mention any case where evidence has been admitted of a transaction which took place three months before the time to which the indictment relates ?

Pickering. Yes. In *Ball's case*, R. & R. 132, the former uttering, of which evidence was given to shew a guilty knowledge, took place about three months before the offence charged in the indictment. But the interval of time which may have elapsed between the previous offence, which is offered in evidence, and the one charged cannot affect the question. It can only affect the weight of the evidence,—not its admissibility. In *Whiley's case*, 2 Leach, 983, Lord ELLENBOROUGH C. J. says, "True it is that the more detached the previous utterings are in point

of time the less relation they will bear to the particular uttering stated in the indictment; and when they are so distant, the only question that can be made is, whether they are sufficient to warrant the jury in making any inference from them as to the guilty knowledge of the prisoner, but it would not render the evidence inadmissible. Circumstances of this kind may produce such strong evidence as to leave no doubt as to the prisoner's knowledge that the notes were forged." The admissibility of such evidence too is not confined to previous utterings of the coin of the realm, or of Bank of England notes, or *notes belonging to the same Bank. Evidence *271] has been admitted of a previous uttering of a note of one *private* bank in order to shew a guilty knowledge at the time of uttering a note of *another private* bank. (*R. v. Kirkwood*, Lewis, C. C. 103.) So in *Ball's case*, 1 Moo. C. C. 470, in order to shew that the prisoner uttered a *Polish* note with a guilty knowledge, evidence was given, —not that he had previously uttered another *Polish* note, or any other *Polish* note at all, but that he had previously agreed to make and deliver to a person some forged *Austrian* notes, which were never in fact made.

ALDERSON B.—May you not say, that at any rate one act of uttering is similar to another act of uttering?

Pickering. Not in any other sense than you can say, that one act of receiving stolen cloth is similar to another act of receiving stolen cloth: but *Ball's case* shews, that the rule respecting the admission of such evidence is not so confined; so also in *R. v. Hough*, R. & R. 120. the possession of other bills of exchange, forged in names different from the one in the bill, which was the subject of the indictment, was admitted to prove the *guilty knowledge*. If in such cases justice is not permitted to be defeated by the argument drawn from the inconvenience of raising different issues, why should it in the

present case? In order to prove *motive*, you are allowed in other cases to give evidence of other felonies than the one charged, as in murder. *R. v. Clewes*, 4 C. & P. 221; *R. v. Vokes*, R. & R. 531.

LORD CAMPBELL C. J.—But there the other felony was shewn to have some connection with the felony charged.

Pickering. In a case of receiving, to what extent is it necessary to shew a connection between the facts offered *to prove the guilty knowledge and the offence charged? Is the rule to be confined to cases [*272 which are in all particulars identical with *Dunn's case*; or is the evidence admissible, if the goods have been received from the same person, though stolen from a different person, or at a different time? or will it be admissible if the other articles were only stolen from the same person, though received from a different one, or at a different time? In civil cases this evidence has been admitted to shew knowledge of a forgery. (*Gibson v. Hunter*, 2 H. Bl. 288.) There in order to prove, among other things, that the defendant knew that the bill, on which the action was brought, contained, at the time of his acceptance of it, the name of a fictitious payee, evidence was held admissible by the House of Lords, to shew that the defendant had accepted other bills which contained the names of other payees, all of which were fictitious.

LORD CAMPBELL C. J.—In my opinion, there was no more ground for admitting the evidence under the third count than under the first or second. Under the two latter, it would have been evidence of the prisoner being a bad man, and likely to commit the offences there charged. But the English law does not permit the issue of criminal trials to depend on this species of evidence. So under the third count, the evidence would only shew the prisoner to be a bad man; it would not be direct evidence of the particular fact in issue; viz., that at the

time of his receiving these specific articles he knew them to be stolen. The cases of uttering with a guilty knowledge, certainly go very far, and I should be very unwilling to apply their principle generally to the criminal law. One ground upon which the evidence has been held admissible there, may be that the prisoner might be supposed from previous utterings of forged notes, &c., to *273] *have acquired a knowledge of what is a forged document, and what is not. But if that be so, there is no analogous *scienter* in this case. I agree in the view taken by my Brothers ALDERSON and TALFOURD in *Sirrell's case*.

ALDERSON B.—I am also of opinion, that this evidence was inadmissible. One reason why such evidence has been held to be admissible in charges of uttering, may be, that one act of uttering a forged note or bill may be said to be similar to another act of uttering a forged note or bill. And so it is clear that the act received in evidence, is of the same nature as that which it is admitted to explain. But here the evidence merely went to shew that the prisoner *was in possession* of other property which had been stolen in the previous *December*, and not that he had received such property knowing it to be stolen. Now the mere possession of stolen property, is evidence, *prima facie*, not of receiving, but of stealing; and to admit such evidence in the present case, would be to allow a prosecutor, in order to make out that a prisoner had received property with a guilty knowledge, which had been stolen in *March*, to shew that the prisoner had, in the *December* previous stolen some other property from another place, and belonging to other persons. In other words, we are asked to say, that in order to shew that the prisoner had committed one felony the prosecutor may prove that he committed a totally different

felony some time before. Such evidence cannot be admissible.

COLERIDGE J., PLATT B., and TALFOURD J. concurred.

[On the trial of an indictment for larceny, it is error to permit evidence to go to the jury for the purpose of proving that just before the defendant committed the act for which he is on trial, he committed another larceny. *Barton v. The State*, 18 Ohio, 221.]

• REGINA v. JAMES UEZZELL, JAMES EATON AND DAVID PARKINS. [*274

Coram,

Lord CAMPBELL C. J.

ALDERSON B.

PLATT B.

COLERIDGE J.

TALFOURD J.

In order to bring a case of night poaching within the stat. 9 Geo. 4, c. 69, s. 9, it is not necessary to prove that three persons were all within the same close or inclosure, or the same piece of open land, if all were of one party, one or more being armed, with the same common purpose, in the place described in the indictment.

THE prisoners were tried before PARKE B. at the Spring Assizes, at *Hertford*, for night poaching, under stat. 9 Geo. 4, c. 69. The prisoners, *Uezzell* and *Parkins*, were not sufficiently identified, and, therefore acquitted. *Eaton* was found guilty.

He was one of three persons who went out together, armed with guns, in the night to destroy game.

The three were proved to have been together in one of the closes, mentioned in the indictment, called the *Thirteen Acres*, but not for the purpose of killing game in that close, (for there was none there,) nor in one adjoining close, by shooting from it. They were passing along it to another place.

One at least of the three was in a close, mentioned in the indictment, called the *Spring*, which had pheasants in it, for the purpose of destroying game in that close, but the whole three were not; they were all, however, at that time of the same company, and with that common purpose.

One count in the indictment, (the fourth,) stated that the prisoners were in inclosed land occupied by *Charles White*.

The *Spring* and the *Thirteen Acres* were both in-
*275] *closed and contiguous, being only separated by a fence, and both in the occupation of *Charles White*.

There was a question whether this would make any difference; the learned Baron, therefore, respited the judgment, and reserved the case for the opinion of this Court. (1 Russell on Crimes, Greaves's ed. 476, note(b); *R. v. Whittaker*, 1 Den. C. C. 310.)

On the 3d of *May*, this case was considered by the Judges, and the following judgments were given:—

LORD CAMPBELL C. J.—The fourth count of the indictment alleges that the prisoners were in inclosed land occupied by *Charles White*; and on that count, at all events, I think that the conviction was right, and ought to be affirmed. Some confusion seems to have arisen on this matter from not attending sufficiently to the provisions of the act of Parliament. It has been treated as though the word *close* occurred in the act, whereas it only specifies *any land open or inclosed*: a practice has consequently prevailed of naming a certain close in the indictment, which is quite needless. It would certainly be requisite to designate *some land*, and give it some description; but if that land comprehended fifty closes, and the offence was committed on any part of such land, it would be within the statute. If, therefore, *A. B.* and *C.* all

belonged to one party, with one common intent, *A.* might be in *Blackacre*, *B.* in *Whiteacre*, *C.* in *Greenacre*, and all be guilty under this statute.

PARKE B.—I am of the same opinion; though I, at one time, felt some doubt whether there could be a conviction on any count. I now think there may on the fourth. If the three are all of one party, one or more being armed with an offensive weapon, and *with the common object of destroying game in the night, it is im- [*276 material whether they are in the same or in different closes or inclosures. It is necessary to describe the land correctly in the indictment for the purpose of identifying it; but if the three are on the land so described, together, under the circumstances I have mentioned, it is sufficient to bring them within the statute, whether the land in question be open or inclosed, or in one or more inclosures, or in one or in several occupations. In Mr. Greaves's very able note, 1 Russell on Crimes, 476, (note(*b*)). The reasoning appears to me to be founded on the assumption, that the statute provided only for the case of three being together in *one and the same* piece of inclosed land, if the land was inclosed, or *one and the same* piece of open land, if it was open, whereas the statute contains no such provision.

ALDERSON B.—The indictment charges the prisoners with entering, &c. certain land, &c.; it is, therefore, necessary to describe the land, the entering which constitutes the offence charged. The land may consist of different closes, and be in different occupations; but whatever be the number of closes, or of occupations, the land in question must be rightly described in the indictment.

PLATT B. and TALFOURD J. concurred.

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*REGINA v. MARY HOGAN.

Coram,
POLLOCK C. B.

PARKE B.
WIGHTMAN J.

PATTESON J.
MARTIN B.

An indictment alleged " that the prisoner, intending to injure the inhabitants of the parish of *B.*, and to burthen them with the maintenance of a bastard child of the prisoner, four days old, and not named, and unable to walk, or to take care of itself or to make known its wants, did abandon and desert the said child, without having provided any means for its support."

Held, bad, (1) because there was no averment that the prisoner had the means of supporting the child, or (2) that the child had sustained any injury by the abandonment.

At the Spring Assizes, held at *Taunton*, before MARTIN B., *Mary Hogan* pleaded guilty to the following counts of an indictment. There were other counts on which no evidence was offered, and an acquittal was taken.

"The jurors aforesaid, on their oaths aforesaid, do further present that the said *Mary Hogan*, being an evil disposed person, and contriving and intending to injure the inhabitants of the parish of *Bathwicke*, in the county of *Somerset*, and unjustly to burthen them with the maintenance of a certain female bastard child, born of the body of her the said *Mary Hogan*, of very tender age, to wit, of the age of four days, and not then named, and unable to move or walk, or to take care and provide for herself, or to make known her wants, on the said 18th day of *January*, at the parish aforesaid, in the county aforesaid, unlawfully and injuriously did abandon and desert the said female bastard child in the said parish of *Bathwicke*, without having provided any means whatever for the support of the said child, the said child not being

*278] then and there settled in the said parish of **Bathwicke*, as the said *Mary Hogan* then and there

well knew, to the great damage of the inhabitants of the parish of *Bathwicke*, and against the peace of our Lady the Queen, her Crown and dignity."

In another count the offence was charged in precisely the same way, except that it was alleged to be done with intent to injure "*Charles Milsom, Joseph Lansdown, Joseph Fasanna, and Thomas Holt Oliver*, then and there being the overseers of the poor of the said parish of *Bathwicke*;" and concluded, "to the great damage of the said *Charles Milsom, Joseph Lansdown, Joseph Fasanna, and Thomas Holt Oliver*, then and there being such overseers as aforesaid."

The Counsel for the prisoner moved, in arrest of judgment, on the ground that the second count disclosed no offence.

The learned Baron respited the judgment, and reserved the case for the opinion of this Court: the prisoner was discharged on her own recognizances to appear and receive judgment at the next assizes.

On the 20th of *June*, this case was argued on behalf of the Crown, by

Phinn. In *R. v. Maude*, 11 Law Jour. M. C. 120, WIGHTMAN J. decided, that stat. 5 *Geo.* 4, c. 83, s. 4, did not apply to the case of an abandonment of a *bastard* child. This indictment raises the question of the criminal liability of a mother in such a case. In *R. v. Renshaw*, 2 Cox C. C. 285, the point was touched upon by PARKE B., but not decided, as the verdict was given on another count. In *R. v. Warne*, 1 Strange, 644, (see cases and precedents collected in a note to *R. v. Renshaw*, 2 Cox C. C. 286,) the Court does not seem to have adverted to the fact, that *the parish might have been burthened with the child as casual poor, even though it had been born in another parish. [*279

PATTESON J.—*Ad interim*, at all events.

Phinn. In this indictment that defect is supplied by an averment, that the child is not settled in the parish. These are all the authorities on the subject. The question is, whether this indictment charges an indictable offence at common law. It has been suggested that the indictment should have averred that the mother had the means of supporting the child; but that averment would only be necessary if the charge was, that she had injured the child by neglecting to give it food.

POLLOCK C. B.—We all think that the indictment cannot be sustained. It is an offence to neglect to provide for a child, so as to injure its health; but here there is no allegation of such an injury, nor any allegation that the mother had the means of supporting it. It is consistent with the averments of this indictment, that the prisoner left the child for a few minutes in order to go and procure the means of supporting it. With regard to the injury to the parish, there is no authority for holding a person to be indictable for merely doing an act, the possible consequence of which may be to injure the parish.

PARKE B.—The cases shew, that if a person is under an obligation to support a child, an indictment, charging a breach of such duty, must aver that an injury was done to the child thereby. In this indictment there is no averment that the prisoner had the means of supporting the child; and it is consistent with every thing here stated, that she had gone to get food for it, or had left it as casual poor.

PATTESON J.—Mr. *Phinn* rested the case on the ground of abandonment; but assuming that the *prisoner
*280] had no means of supporting it, the abandonment will not constitute an offence. In order to fix her with

criminal neglect in abandoning the child, it will be necessary to aver that she had the means of supporting it.

WIGHTMAN J. and MARTIN B. concurred.

PARKE B. remarked, that in this case the prisoner had been discharged on *her own recognizances*; which was contrary to the provisions of stat. 11 & 12 Vict. c. 77, s. 1.(a)

 *The Editor, at the suggestion of several experienced friends in the Profession, has included in the present Part, together with all the Crown Cases Reserved, determined up to this date, cases ejusdem generis, argued and determined in the Queen's Bench, and according to the plan of the elder Reporters of Crown Law, proposes in future, to include in these Reports, all such cases in that Court, and in the Courts of Error.*

TEMPLE,
February 14, 1852.

*REGINA v. MATHEW SCAIFE AND THOMAS
ROOKE. [^{*}281

Where, upon the trial of an indictment against three prisoners for felony, it was proved that a witness had been kept out of the way by the procurement of one of the prisoners, *Held*, that the deposition of the absent witness was receivable in evidence against the prisoner by whose procurement she was kept away; but that it was not evidence against the other two prisoners, and that its reception, without a direction to the jury that it was not evidence against the latter, was ground for granting a new trial.

THE prisoners were indicted, together with *John Smith*, at the Quarter Sessions for the borough of *Kingston-upon-*

(a) A similar mistake occurs in *R. v. Illidge*, 1 Den. C. C. 405.

Hull, for stealing from the prosecutor two hundred pounds in sovereigns and half sovereigns. The indictment was removed into the Queen's Bench by *certiorari*, and the case was tried before Mr. Justice CRESSWELL, at the *Yorkshire* Spring Assizes. At the trial the deposition of *Sarah Ann Garnett*, taken before the magistrates in the mode directed by 11 & 12 *Vict.* c. 42, s. 17, was tendered in evidence upon the ground that she had been kept out of the way by the procurement of one of the prisoners; and evidence was offered on the part of the prosecution to shew that one of the bail of *Smith* had paid some money to a girl who called herself *Sarah Ann Garnett*, who was about the age and resembled in appearance the absent witness. It was submitted, on behalf of the prisoners, that there was not sufficient proof of identity. Secondly, that if there were, the fact proved might have been an indiscreet act of his bail without the concurrence of *Smith*. Thirdly, that under any view of the case, the deposition could not be evidence against *Scaife* and *Rooke*. The learned Judge received the deposition in evidence, subject to the third objection taken to it.

In the following Easter Term, in the Queen's Bench, *282] a rule nisi for a new trial was obtained on behalf of **Scaife* and *Rooke*, on the ground of the improper reception of evidence.

On the 2d *June*, *Trinity* Term, A. D. 1851, this case was argued before Lord CAMPBELL C. J., PATTESON J., COLERIDGE J., and ERLE J.

Hunter, for the Crown.

At common law, if a witness cannot be found after a diligent search, the deposition which he has made before a magistrate is admissible as secondary evidence. In the King's Bench, 21 *Jac.* 1, (*Godb.* 326) (a), it was said, that

(a) Cited in 1 *Pitt Tayl. Ev.* 332.

“if the party cannot find a witness, then he is, as it were, dead unto him, and his deposition in an English Court, in a cause betwixt the same parties, plaintiff and defendant, may be allowed to be read to the jury, so as the party make oath that he did his endeavour to find his witness, but he could not see nor hear of him.” Depositions before a magistrate on a primary inquiry are taken in the presence of the prisoner, who has then full opportunity of cross-examining the witnesses. There is no ground for any distinction between civil and criminal proceedings respecting the admissibility of evidence. (1 *Pitt Tayl. Ev.* 332; 1 *Salk.* 286; *Show.* 363; *Com. Dig.* tit. “*Testmoigne*.” *Buller’s N. P.* 242.) In *Lord Morley’s case* (6 How. St. Tr. 771, S. C.) it was resolved by the Judges, that the examination of a witness taken before the coroner was not rendered admissible, on proof that the witness himself could not be found after diligent search; but in proceedings before the coroner the prisoner is not necessarily present. In *Rex v. Hagan*, 8 Car. & P. 167, which was an indictment for felony, the deposition of a witness for the prosecution, who had gone to sea, was read in evidence on the part of the prisoner, with the *consent of the prosecutor. The deposition of a witness who has been searched for and [*283 cannot be found, and is kept away by the means or procurement of the opposite party or prisoner, is admissible. Fifth resolution of the Judges (*Rex v. Lord Morley*, 6 How. St. Tr. 770, 771; *Rex v. Harrison*, 12 How. St. Tr. 834).

Lord CAMPBELL C. J.—The cases in the State Trials before the Revolution, as to the admissibility of evidence, are entitled to very little weight.

Hunter cited *R. v. Gutteridge*, 9 Car. & P. 473; and *Green v. Gatewick*, Buller’s N. P. 243.

Dearsly, for the prisoners.

The case of the *King v. Hagan* (8 Car. & P. 167,) cited, is adverse to the prosecution, for, in that case, the Judge, in the first instance, refused to admit the deposition, and it was afterwards allowed to be read only by consent of both sides. In this case there was no consent. The opinion of *Pitt Taylor* (*Pitt Tayl. Ev.* 332,) that there is no ground for any distinction between civil and criminal proceedings in this respect, is not correct, inasmuch as there is this difference, that in the former, a bill of exceptions will lie, but not in the latter case. (a) Most of the cases cited referred to civil proceedings, and the cases of *R. v. Lord Morley*, and *R. v. Harrison*, are of slight authority. In civil proceedings it might be safe to admit the deposition of an absent witness, but in criminal cases, in many instances, it might prove dangerous, and put in peril both life and liberty. Suppose, a man from spleen or malice preferred a charge against another, and *284] then, fearing the *risk of discovery through a cross-examination, absconded, would it be fair to admit his deposition to be received, and thereby deprive the prisoner of the means of establishing his innocence, by a cross-examination of the witness? If the deposition, as suggested, was always receivable at common law, where was the necessity of passing section 17 of stat. 11 & 12 Vict. c. 42?

LORD CAMPBELL C. J.—That enactment specifies certain preliminary conditions on which the depositions may be admitted,—such as the signature of the justices, by or before whom it purports to have been taken.

Dearsly. Yes. And from the reading of the whole section, it would appear, that anterior to that enactment, the deposition could not have been before admissible.

(a) *Quære.* Whether a bill of exceptions lies not in any criminal case is a point not settled. Per Lord Hardwicke, *R. v. Preston*, Rep. temp. Hard. 251; 1 Phill. Ev. 312.

The practice of the Courts before the passing of the 17 sect. 11 & 12 *Vict.* c. 42, has been uniform and general in the rejection of depositions, except in case of death, or the absence of the witness through the procurement of the prisoner. In 2 *Russ. Cr.* 889, ed. by *Greaves*, the only cases in which the depositions are mentioned as admissible, are where the witness is dead, or where he has been kept away by the procurement of the prisoner. The learned Judge at the trial, at first thought he ought to reject the deposition, but after consideration, said he would receive it. His Lordship thought there was evidence which satisfied his mind, that the witness had been kept out of the way by the procurement of one of the prisoners, *viz.*, by *J. Smith*. This Court is not asked to review the propriety of that conclusion. But it is contended that the Judge at the trial should have directed the jury in his summing up, that though the deposition was receivable in evidence against **J. Smith*, still [*285 it was no evidence against *Rooke* and *Scaife*, who had in no wise been privy in procuring the absence of the witness. On this ground alone, it is submitted that the rule for a new trial should be made absolute.

LORD CAMPBELL C. J.—I am of opinion that the rule for a new trial must be made absolute. Evidence having been given that the defendant *Smith* had resorted to a contrivance to keep the witness out of the way, the deposition was admissible against him; but it was not admissible against the other defendants, there being no evidence to connect them with the contrivance. The learned Judge, CRESSWELL J., in summing up to the jury, seems to have made no distinction as to the duty of the jury to consider the deposition of the absent witness as evidence against the defendant *Smith* alone, and not as against the others. The question then is, whether such a deposition is admissible against a prisoner *without proof*

that the deponent has been kept away by his contrivance, or without proof of the death of the witness? No case has yet gone so far; and I should be afraid to lay down a rule which would deprive a prisoner of the advantage of having a witness for the prosecution against him examined and cross-examined before the jury, upon every matter that may be material to his defence. I, therefore, think that the deposition was improperly admitted against *Scaife* and *Rooke*, and that there should be a new trial.

PATTESON J.—The deposition of the absent witness, *Sarah Ann Garnett*, was admissible as against the defendant *Smith*, by whose contrivance she was kept out of the way, but it ought to have been applied to the case against him only, and not to the case against the other prisoners. No such distinction appears to have been *286] *made at the trial, but the evidence was allowed to go to the jury generally against all the prisoners, it being assumed, without any evidence whatever to support the assumption, that they all were connected with the contrivance to keep the witness out of the way.

COLERIDGE J.—Before the enactment of 11 & 12 Vict. c. 42, I always understood the law was, that if a witness were absent, either by reason of the death of the witness, or by the procurement of the prisoner, the deposition was receivable in evidence against him.(a) But I believe these were the only two cases where the absence of a witness let in his depositions. Absences from every other cause were within the same category, and did not render them admissible. The 17th section of the recent statute took another case,—where a witness was proved to be so ill as to be unable to travel,—out of one category and put it into another.

ERLE J. concurred. Rule absolute for a new trial.

(a) 1 *Hale*, P. C. 305; 2 *Hale*, P. C. 52.

Note by the Editor.—This is, I believe, the first instance of a new trial having been granted in a case of felony. It will be observed, that the indictment had been removed by *certiorari* from sessions into the Queen's Bench, and that the record was sent down by the Queen's Bench to be tried before Mr. Justice CRESSWELL at York.

Mr. Justice CRESSWELL, at the trial, received the deposition of *Sarah Ann Garrett*, subject to the objection taken to it, without specifying any particular mode in which the prisoners were to avail themselves of the objection.

The prisoners' counsel appears to have been under the impression that his Lordship had reserved the case for the Court of Criminal Appeal; but Mr. Justice CRESSWELL thought that as the record came from the Queen's Bench, that was the proper tribunal to deal with the case, and fearing that the prisoners' counsel might be under some misapprehension on the subject, his Lordship caused him to be informed that he thought the question as to the admissibility of the deposition should be raised in that Court.

*A copy of the rule of the Queen's Bench for the new trial is here sub-joined; it has been copied from the books of the Crown Office:— [*287

"Monday, 2 June,
Yorkshire,
THE QUEEN
against
MATHEW SCAIFE
and THOMAS ROOKE
(for Felony.)

Upon hearing counsel on both sides It is ordered that the verdict of Guilty obtained for the Crown at the last Spring Assizes holden in and for the county of York in this prosecution be set aside and a new trial had.

"Mr. Hunter for the Prosecution ;

"Mr. Dearsly for the Defendants."

It seems hitherto to have been assumed that no new trial could be granted in cases of felony. In *R. v. Mawby, Bart., and Others*, 6 T. R. 638, Lord KENYON remarked, "In one class of offence, indeed greater than misdemeanors, no new trial can be granted at all." And see *Cornur's Crown Practice*, p. 161, *Eighth Rep. Com. Crim. L.* p. 159, 2 *Tidd's Prac.* 918, and 2 *Russell on Crimes*, 726.

HENRY HOLLOWAY v. THE QUEEN.

1. In an indictment under 4 *Geo. 4*, c. 64, s. 43, for aiding a prisoner to escape from prison, it is unnecessary to set out the means which had been employed by the defendant to aid the prisoner to escape.
2. Where a turnkey, after certain overtures from a prisoner confined in jail, received into his possession a key, capable of opening certain locks in the jail, which had been made by means of the procurement of the prisoner who was then and there meditating his escape, with intent thereby, and by means thereof, to enable the said prisoner to escape. *Held*, that this was a sufficient aiding within the statute.
3. And where upon an indictment containing nine counts, the Court of Quarter

Sessions gave a general judgment that the defendant be transported beyond the seas for the term of fourteen years; and a writ of error was brought on the ground that some of the counts were bad. *Held*, that the fourteen years must be taken to be the same fourteen years upon each count, and that under 11 & 12 *Vict.* c. 78, s. 5, the Court of Error, if there were one good count in the indictment, would be bound either to pronounce the judgment which ought to have been pronounced in the Court below, or to remit the record to the sessions, in order that that Court should pronounce the proper judgment.

WRIT of Error in the Queen's Bench. The caption of the indictment was in the following form:—

Warwickshire, } Be it remembered that at the General
to wit. } Quarter Sessions of the peace of our
Lady the Queen holden at *Warwick* in and for the
*288] *said county on *Monday* in the first week after
the 28th day of *December*, that is to say, the 30th day of
December in the fourteenth year of the reign of our Sovereign Lady Victoria &c. and in the year of our Lord 1850 and from thence continued by adjournment and holden at the city of *Coventry* in and for the said county of *Warwick* on *Wednesday* the first day of *January* in the year of our Lord 1851 before *William Dickens* Esquire &c. and others their fellow keepers of the peace of our said Lady the Queen and also justices of the said Queen appointed to hear and determine divers felonies trespasses and other misdemeanors done and committed in the said county and of the *quorum* and so forth upon the oath of &c. [*names of the grand jury*] good and lawful men of the county aforesaid then and there sworn and charged to inquire for our said Lady the Queen and the body of the said county it is presented in manner and form following, (that is to say)—

The first, second and seventh Counts of the indictment which are those upon which the questions raised in this case depended, were as follows:—

Warwickshire, }
Coventry Division, } The jurors for our Lady the Queen
to wit. } upon their oath present that the
} gaol hereinafter in the first three

counts of this indictment mentioned to wit the gaol of our Lady the Queen at *Coventry* in and for the *Coventry* division of the county of *Warwick* being situate at the parish of the *Holy Trinity* in the city of *Coventry* in the said *Coventry* division of the county of *Warwick* is a gaol to which the provisions of a certain act of Parliament made and passed in a certain session of Parliament holden the fourth year of the reign of His late Majesty King *George* the Fourth entitled An Act for consolidating and amending the laws relating to the building repairing [*289 and regulating of certain Gaols and Houses of Correction in England and Wales did at the time of the commission of the offence hereinafter in the first three counts of this indictment mentioned and still do extend. And the jurors aforesaid upon their oath aforesaid do further present that heretofore to wit on the 18th day of *December* in the year of our Lord 1850 *Robin Thompson* was a prisoner in the said gaol and one *Henry Holloway* late of the parish of the *Holy Trinity* in the city of *Coventry* in the said division of the county of *Warwick* labourer on the day and year last aforesaid with force and arms at the parish aforesaid in the said *Coventry* division of the said county of *Warwick* feloniously did aid and assist the said *Robin Thompson* then and there being such prisoner as aforesaid in attempting to escape from the said gaol against the form of the statutes in such case made and provided and against the peace of our Lady the Queen her Crown and dignity.

2d Count. And the jurors aforesaid upon their oath aforesaid do further present that heretofore and before and at the time of the committing of the offence hereinafter in this count mentioned the said *Robin Thompson* being a prisoner in the said gaol to wit the said gaol of our Lady the Queen at *Coventry* in and for the said *Coventry* division of the county of *Warwick* so situate as

aforesaid was meditating projecting and endeavouring to procure and effect his escape from the said gaol otherwise than by due course of law and in order thereto had procured a certain key being the key hereinafter mentioned to be made and constructed for the use of him the said *Robin Thompson* with intent to effect the said escape of the said *Robin Thompson* by means of the said key and *290] had also made and caused to be made to the *said *Henry Holloway* then and there being a turnkey and having authority in the said gaol certain overtures and promises whereby to induce and persuade the said *Henry Holloway* to aid and assist the said *Robin Thompson* to escape from the said gaol and so in manner aforesaid was endeavouring and attempting to procure his escape from the said gaol. And the jurors aforesaid upon their oath aforesaid do further present that the said *Henry Holloway* not regarding his duty in that behalf then and there to wit on the day and year aforesaid and whilst the said *Robin Thompson* was such prisoner in the said gaol as aforesaid with force and arms at the parish aforesaid in the said *Coventry* division of the said county of *Warwick* feloniously and designedly did procure and receive and take into the custody and possession of the said *Henry Holloway* the said key then and there being adapted and fitted to and capable of opening and unfastening divers locks in the said gaol whereby the said *Robin Thompson* was then and there secured in the said gaol with intent thereby and by means thereof to enable the said *Robin Thompson* to escape from the said gaol and to go at large withersoever he would. And so the jurors aforesaid upon their oath aforesaid do say that the said *Henry Holloway* then and there to wit on the day and year aforesaid with force and arms at the parish aforesaid in the said division of the said county of *Warwick* in manner and form in this count mentioned felo-

niously did aid and assist the said *Robin Thompson* then and there being such prisoner as aforesaid in attempting to escape from the said gaol as in this count mentioned against the form of the statutes in such case made and provided and against the peace of our Lady the Queen her Crown and dignity.

*7th Count.(a) And the jurors aforesaid upon their oath aforesaid do further present that here- [*291 tofore to wit on the 4th day of *September* in the year of our Lord 1850 *Harry Scott Gibb* Esquire being one of the justices of our said Lady the Queen assigned to keep the peace of our said Lady the Queen in and for the said county of *Warwick* in due form of law did make his warrant of commitment under his hand and seal bearing date the same day and year last aforesaid directed to the constable of *Rugby* and to the keeper of the common gaol at *Coventry* in the said county of *Warwick* by which said warrant of commitment the said *Harry Scott Gibb* as such justice as aforesaid did require the said keeper of the said gaol to wit one *Darwin Galton* Esquire sheriff of the said county of *Warwick* and keeper of the said gaol to receive into the custody of the said keeper to wit the said *Darwin Galton* sheriff as aforesaid the body of the said *Robin Thompson* then being charged with having on the 31st day of *August* in the year aforesaid at the parish of *Rugby* in the said county feloniously forged a certain note of the governor and company of the *Bank of England* commonly called a bank note for the payment of 5*l.* and afterwards to wit on the day and year last aforesaid at the parish and county aforesaid that he the said *Robin Thompson* did feloniously offer utter dispose of and put off a certain other forged note of the governor and company of the *Bank of England* commonly called a bank

(a) The fourth count referred to in the judgment of *PATTESON J.*, *post*, p. 297, was in effect the same as the seventh count.

note for the payment of 5*l*. he the said *Robin Thompson* then and there well knowing the same to be forged with intent to defraud the governor and company of the *Bank of England* And that the said keeper of the said *292] gaol to wit the *said *Darwin Galton* sheriff as aforesaid should safely keep the said *Robin Thompson* in the custody of him the said keeper to wit the said *Darwin Galton* sheriff as aforesaid until the next assizes or general gaol delivery to be held at *Coventry* in and for the *Coventry* division of the county of *Warwick* or until he should be thence delivered by due course of law. By virtue of which said warrant of commitment the said *Robin Thompson* afterwards to wit on the same last mentioned day and in the year aforesaid was duly conveyed and committed to a certain gaol of our said Lady the Queen to wit the said gaol in and for the said division of the said county of *Warwick* situate at the parish of the *Holy Trinity* aforesaid in the said *Coventry* division of the said county of *Warwick* for the cause in the said warrant of commitment above specified and expressed and then and there to wit on the same last mentioned day and in the year aforesaid at the parish aforesaid in the said division of the said county of *Warwick* lawfully kept and detained in the said gaol in the custody of the said *Darwin Galton* sheriff as aforesaid then and there being the keeper of the said gaol under and by virtue of the said warrant. And the jurors aforesaid upon their oath aforesaid do further present that the said *Henry Holloway* afterwards and within the space of one year heretofore to wit on the 18th day of *December* A. D. 1850 and whilst the said *Robin Thompson* was a prisoner lawfully committed to and detained in the gaol aforesaid by virtue of the said warrant of commitment for the felony therein specified and expressed as aforesaid with force and arms at the parish aforesaid in the said *Coventry* division of

the said county of *Warwick* feloniously was aiding and assisting the said *Robin Thompson* then and there being such prisoner in the said gaol and lawfully committed to *and detained therein as aforesaid for the felony [*293 and cause aforesaid to attempt to make his escape from and out of the said gaol against the form of the statute in such case made and provided and against the peace of our Lady the Queen her Crown and dignity.

The record then stated the arraignment, plea, issue, venire, verdict, allocutus, and the judgment of the Court of Quarter Sessions, which was as follows:—"Wherefore all and singular the premises being seen and understood by the Court here, it is thereupon ordered and adjudged by the Court here that the said *Henry Holloway* be transported beyond the seas for the term of fourteen years."

On the 11th *June*, A. D. 1851, this case was argued upon a *Concilium* before Lord CAMPBELL C. J., PATTESON J., COLERIDGE J., and ERLE J.

S. Flood and *Partridge*, for the prisoner, plaintiff in error. *Mellor*, for the Queen, defendant in error.

Flood contended that the indictment did not charge an offence within 4 *Geo.* 4, c. 64, sect. 43. He said that the indictment was bad, because it did not shew that *Robin Thompson* had attempted to escape, or that his attempt had been assisted by the prisoner, plaintiff in error. The second count only shewed an intention to escape, which intention was very different from an attempt. Nor did the second count sufficiently inform the prisoner of the charge, nor state with sufficient certainty the means by which he aided or assisted *Thompson*. It shewed no connection between *Thompson's* intention to escape, and the alleged aiding and assisting on the part of the prisoner, plaintiff in error. *Com. Dig. Pleader*, s. 38.

Lord CAMPBELL C. J.—It was held in *R. v. Tilley*, 2 Leach, C. C. 662, that there was no necessity for alleging *294] *that the party in prison aided did attempt to escape, for that he could not have been aided if no such attempt had been made.

Flood submitted that there was no proper venue to the indictment. It did not sufficiently appear that the act of aiding and assisting was in the county of *Warwick*. *R. v. O'Connor*, 5 Q. B. 16; *R. v. M'Daniel and Others*, Fost. 121, 125. The caption and the venue are in the ordinary form where adjourned sessions are held, but the jurisdiction of the sessions is peculiar. Then the principal should have been tried before the prisoner, the plaintiff in error. *Thompson* was alleged to have made an attempt to commit a felony; the offence of being accessory to such an attempt is a misdemeanor.

Lord CAMPBELL C. J.—But this is a statutory felony,—made a substantive felony by 4 *Geo. 4*, c. 64.

Flood. The first three counts do not shew that the prosecution was instituted within one year after the offence committed, which is necessary, unless the 4th sect. of 16 *Geo. 2*, c. 31, is repealed by 4 *Geo. 4*, c. 64. Again the indictment should have been found by a grand jury from the *Coventry* division of the county, and not by a grand jury from the county generally, 5 & 6 *Vict.* c. 110, ss. 7, 9. Lastly, one or more of the counts being bad, and the sentence of transportation being a general sentence, the judgment is bad. *O'Connell v. Rey.*, 11 Cl. & Fin., 155. There should have been a separate sentence upon each of the nine counts.

PATTESON J.—Why may not the prisoner have assisted *Thompson* at nine different times?

Flood. It is charged in all the counts as one aiding and assisting. It is doubtful whether 11 & 12 *Vict.* c. 78, s. 5, applies to any case, except where the amendment

is to increase or diminish the punishment awarded upon *an indictment, none of the counts of which are [*295 bad.

Mellor, for the Crown, was stopped by the Court.

LORD CAMPBELL C. J.—I entertain no doubt that under 11 & 12 *Vict.* c. 78, s. 5, if we find one good count in the indictment, although all the other counts are bad, we should be bound either to pronounce the judgment which ought to have been pronounced by the Court of Quarter Sessions, or to remit the record to that Court to pronounce the proper judgment. In *Rex v. Bourne*, 7 Ad. & El. 58, it was held by this Court, that at Common law it had no power to pronounce the proper judgment in such a case, or to remit the case for judgment to the Court below; but now there is a positive enactment of the Legislature, that “whenever any writ of error shall be brought upon any judgment or any indictment, information, presentment, or inquisition in any criminal case, and the Court of Error shall reverse the judgment, it shall be competent for such Court of Error either to pronounce the proper judgment, or to remit the record to the Court below, in counts, the Court below ought to arrest the judgment on order that such Court may pronounce the proper judgment upon such indictment, information, presentment, or inquisition.” In the case of an indictment with some good and some bad counts, after a verdict for the Crown upon all the the bad counts, and pass sentence on the good counts. Should the Court below, however, have pronounced judgment generally, the Court of Error, may now order judgment to be arrested on all the bad counts, and pronounce the proper judgment on all the good counts. It has been contended that the stat. 11 & 12 *Vict.* c. 78, applies only to cases where the *punishment* is to be altered; but sect. 5 says any “judgment,” and there can be no difficulty in

the construction of the statute. *The plaintiff in error has failed to shew that any one of the counts in this indictment is bad. The indictment is founded on the 4 Geo. 4, c. 64, s. 43, which enacts, that "if any person shall by *any means whatever*, aid and assist any prisoner to escape, or in attempting to escape from any prison every person so offending, whether an escape be actually made or not, shall be guilty of felony." Under this clause a count is sufficient, although it does not state the *means* which had been employed to assist the party in prison to escape. The person charged with aiding the attempt to escape is equally guilty, whatever means he may have used; he cannot assist a party in prison to escape without the employment of some means. This is not like an indictment for obtaining goods by false pretences, in which the false pretences must be set out, in order that the Court may see whether they are within the statute. In the second count, the means employed by the prisoner to aid the escape are set out. It is alleged, that *Thompson* being a prisoner in the gaol, was meditating and endeavouring to effect his escape, and that *Holloway* (the plaintiff in error) in consequence of overtures from *Thompson*, did then and there receive and take into his possession a certain key, capable of opening divers locks in the gaol, with intent to enable *Thompson* to escape from the gaol, &c., and that so the defendant "in manner and form in this count mentioned feloniously did aid and assist the said *Thompson* then and there being such prisoner as aforesaid, in so attempting to escape from the said gaol." The count, therefore, shews most amply what the defendant had to answer within the meaning of the statute. It has been suggested that this might have been done innocently; but the averment that the act of the defendant was done *with intent*

to enable *Thompson* to escape from prison, prevents such an *argument. The answer to another objection made by the prisoner's Counsel that the principal should have been tried before the defendant, is, that this is an indictment, not at common law, against an accessory, but under the 43d section of 4 *Geo.* 4, c. 64, which makes it a substantive felony to *aid and assist* an attempt to escape, such attempt itself being only a misdemeanor. With respect to the objection to the caption of the indictment, by the stat. 5 & 6 *Vict.* c. 110, the city and county of *Coventry* are annexed and made part of the county of *Warwick*, and the sessions held at *Coventry* are in the same situation as sessions held in other counties by adjournment at two or three different places. The venue, I think, is sufficient; and I am of opinion that the judgment must be affirmed.

PATTON J.—With respect to the objection to the caption, the stat. 5 & 6 *Vict.* c. 110, shews that the sessions are to be for particular divisions of the county, but they are not the less sessions for the whole county. The statute does not make the divisions two counties; therefore, the jury are properly described as a jury of the county. As to the validity of the counts I am of opinion that there is no objection to the first, fourth, and seventh; and that the others are also good for the reasons given by my Lord. The statement of the venue to the act of assisting the prisoner in attempting to escape is sufficient. Whether 16 *Geo.* 2, c. 31, is altogether repealed or not is immaterial, because 4 *Geo.* 4, c. 64, s. 43, creates a substantive felony; and as it is made a felony to assist a prisoner in attempting to escape, “by any means whatever,” it would be idle and useless to set out the means in the indictment. I also think that the judgment is good. The fourteen years must be taken to be the same fourteen years on each count.

*298] *COLERIDGE J.—I am of opinion that the right construction has been put upon the stat. 4 Geo. 4, c. 64, s. 43, by the Lord Chief Justice and my Brother PATTESON, and that the second count contains all the conditions which the prisoner's counsel says are necessary.

ERLE J. concurred.

REGINA v. WILLIAM MURDOCK.

The prisoner was a travelling salesman, whose duty it was to go into the county of *D.* every *Monday* to sell goods and receive money for them there, and return with it to his master in *N.* every *Saturday*. He received two sums of money for his master in *D.*, but never returned to render any account of them. Two months afterwards he was met by his master in *N.*, who asked him what he had done with the money. The prisoner said he was sorry for what he had done; he had spent it.

Held, that the prisoner was rightly indicted in *N.*, there having been evidence to go to the jury of an embezzlement in *N.*

THE prisoner was tried before PARKE B., at the Summer Assizes, for the county of the town of *Nottingham*, on an indictment for embezzling two sums, the property of his master, *James Macqueen*.

The prisoner was a travelling salesman, and his duty was to go into *Derbyshire* every *Monday*, and to sell goods and receive the money for them there, and to return with it to his master in *Nottingham* on a *Saturday*.

He received the two sums mentioned in the indictment on the 6th of *May*, in *Derbyshire*, and did not return the following *Saturday*, nor at all to his master's.

There was no evidence of what became of him till two months after, when he was met by his master in *299] **Nottingham*, who asked him what he had done with the money, and he said, "he was sorry for what he had done; he had spent it."

The prisoner was found guilty, but as the learned Judge doubted whether he could be properly convicted on this evidence of embezzlement *in the town of Nottingham*, his Lordship did not pass sentence. (a)

On *Saturday*, 15th *November*, A. D. 1851, this case was argued before Lord CAMPBELL C. J., PARKE B., MAULE J., TALFOURD J., and MARTIN B.

Manson, for the Crown.

The two sums of money were received in *Derbyshire*; there was no proof of a receipt of money in *Nottingham*, and the question is, whether there was jurisdiction to try the prisoner in *Nottingham* for embezzlement. I submit that there was jurisdiction, inasmuch as the prisoner ought to have accounted to his master in *Nottingham*, and did not do so. It has been laid down by COLERIDGE J., that non-accounting is equivalent to denial. (*Reg. v. Jackson* 1 Car. & K. 284; *Rex v. Hobson*, Russ. & R. 56; *Reg. v. Norman*, Car. & M. 501.)

Lord CAMPBELL C. J.—Both parties, I suppose, were living in *Nottingham*.

Manson. Yes. In *Rex v. Squire*, Russ. & R. 349, the Judge told the jury that, if the prisoner had fraudulently omitted to account, he was guilty of embezzlement. Here there was a fraudulent omission to account in *Nottingham*.

MARTIN B.—The question is, whether there was jurisdiction to try the prisoner in *Nottingham*.

Lord CAMPBELL C. J.—Whether there was evidence to go to the jury of an embezzlement in *Nottingham*?

**Manson*. In *Rex v. Hobson*, Russ. & R. 56, [*300 where the prisoner received the money in *Shropshire*, and denied its receipt in *Staffordshire*, it was held that he was rightly tried in the former county.

(a) See *Rex v. Taylor*, 3 Bos. & Pul. 596.

LORD CAMPBELL, C. J.—Because there was evidence against the prisoner in *Derbyshire*, it does not follow that he might not be tried in *Nottingham*.

Manson. We have no evidence where the prisoner was at the time when he should have accounted. The presumption from the facts of the case is, that he returned to *Nottingham*, and that having returned, he omitted to account, as it was his duty to do. By 7 & 8 Geo. 4, c. 64, s. 12, in all cases in which an offence is begun in one county and completed in another, the prisoner may be tried in either.

PARKE B.—That act does not apply in this case. The question is, where the offence *was* completed.

No Counsel appeared for the prisoner.

LORD CAMPBELL C. J.—The question is, whether there is evidence to go to the jury whether the embezzlement was committed in the town and county of *Nottingham*, and I think that there was sufficient evidence upon which the jury might have come to that conclusion. The jury may have disbelieved the prisoner's story as to the way in which he had spent the money, and they may have thought that the prisoner had spent it in *Nottingham*; they were not bound to arrive at such a conclusion, but still, I think, there was evidence to go to the jury that the embezzlement took place in *Nottingham*.

PARKE B.—I think, on consideration, that there was sufficient evidence for the jury of embezzlement in *Nottingham*; that the prisoner's *not returning and accounting to his master in Nottingham*, as it was his duty to do, was
 *301] equivalent to embezzlement in *Nottingham*. *The mere fact of his spending the money does not of itself constitute embezzlement; there must be a refusal to account, or a non-accounting. In the case *Rex v. Taylor*, 3 Bos. & Pul. 596, where a servant received money for his master in the county of *Surrey*, and

having afterwards returned into *Middlesex*, and being called on to account for it by his master, there denied the receipt of it, it was held, that he was rightly indicted for embezzlement in *Middlesex*. As Lord *Alvanley*, in giving judgment, remarked, "Here there is no evidence of any act to bring the prisoner within the statute until he is called upon by his master to account. When called upon by his master to account for the money, the prisoner denied that he had ever received it. This was the first act from which the jury could, with certainty, say that the prisoner intended to embezzle the money. There was no evidence of the prisoner having done any act to embezzle in the county of *Surrey*, nor could the offence be complete, nor the prisoner guilty, unless he refused to account to his master.

MAULE J.—I agree in the conclusion at which the Lord Chief Justice and PARKE B. have arrived, but for different reasons from those stated by PARKE B. I think that the offence was committed, when two months after the receipt of the money, the prisoner met his master in *Nottingham*, and on being asked by his master respecting the money, did not account to him for it. In my view the offence was then complete, and the prisoner became liable to be indicted in *Nottingham*. The mere omission to account, if the prisoner had never returned to *Nottingham*, would not have rendered him liable to be tried in *Nottingham*. Suppose that he had gone to *Derbyshire*, and stayed there six months, and never *returned [^{*302} to *Nottingham*, he would, according to my Brother PARKE's view, if apprehended in *Derbyshire*, have been indictable in *Nottingham*. I cannot think that can be so. Some of the cases say that non-accounting is sufficient evidence of embezzlement; but in all these cases the prisoner is in the county where he breaks his duty, and

completes the offence of embezzlement by omitting or refusing to account.

TALFOURD J.—My opinion is, that the offence was completed when the prisoner refused to account to his master in *Nottingham*.

MARTIN B.—I cannot say that there was no evidence to go to the jury; but if the jury were of opinion that the prisoner embezzled the money in *Nottingham*, I think that they arrived at a wrong conclusion.

REGINA v. THOMAS GRIFFIN PHILLPOTTS.

On a trial where it was material to prove whether *J.* had died before *M.*, the defendant produced a document purporting to be a copy of *J.*'s will, and falsely swore that he had examined it with the original will in the registry at *L.*; and also that he had examined a memorandum at the foot of the copy of the will with the entry in a Book called the Act Book in the same registry. The Judge offered to admit the evidence, but it was withdrawn; it was, in point of law, inadmissible.

Held, that the circumstances that the evidence was inadmissible and was withdrawn, did not affect the question of perjury, as it could not purge the false swearing; and that, as it was material whether probate of *J.*'s will was granted in the lifetime of *M.*, if the evidence of the prisoner had been received, it would have been material to the issue, and, consequently, that the false oath of the prisoner amounted to perjury.

Semle, per MAULE J.—That false swearing in a judicial proceeding, in a matter material to that judicial proceeding, is perjury, whether the false oath be relevant or not to the issue then being tried.

UPON the trial of the cause *Doe dem. Richard v. Griffiths*, a copy of the will of *William Joseph*, was tendered,
 *303] *and on objection to its admissibility, the present defendant, who was then attorney for the lessor of the plaintiff, swore that he had examined the copy produced, with the original will in the Registry at *Llan-daff*, and upon further objection, that the original will was inoperative in respect of a chattel interest, and that

therefore, either the probate ought to be produced, or the Act Book be proved; the defendant further deposed, that he had examined the memorandum at the foot of the copy of the will, with the entry in the Act Book, at the same Registry.

Upon this evidence the Judge offered to receive the document in evidence; but the Counsel for the plaintiff withdrew it.

Upon the trial of the present indictment at the *Monmouthshire* Summer Assizes, before ERLE J., it was proved that the defendant had not made either of the examinations which he so deposed to, and he was found guilty of perjury; but the learned Judge reserved the question, whether the false oath was relevant and material to the issue then being tried, so as to amount to perjury; as to which the following are the facts:—

On the trial of the ejectment, the lessor of the plaintiff claimed to be entitled to a term which had been granted to *William Joseph* and *Rees Morgan*, jointly; and his title was that *Morgan* had survived *Joseph*, and assigned the term to *Catherine*, the widow of *Joseph*, who married *Saunders*, and on her marriage made a settlement, under which the term vested in him.

The will of *Joseph* was irrelevant to this title; but the time of his death was a material fact, in order to prove that *Morgan* had survived him, and proof of the probate of the will of *Joseph*, would thus have been relevant evidence towards establishing the plaintiff's *title.

The purpose of the plaintiff's Counsel in tender- [*304
ing the evidence, was to clear a doubt respecting the interest of *Joseph* in the term, which was expected to be raised by the defendant, and after the document was withdrawn, the survivorship of *Morgan* to *Joseph*, was clearly proved by other evidence for the plaintiff; but

the purpose for which the document was offered, was not stated at the time of the trial of the ejectment.

It further appeared that in the Registry at *Llandaff*, it was the practice to indorse the act of probate on the original will, and that the book called the Act Book, contained a daily account of the matters of business completed in the Registry, and that the memorandum at the foot of the document in question, was a copy of the entry in this book relating to the probate of the will of *Joseph*, and not a copy of the act of probate indorsed on the original will. It follows that the examination of the document tendered, with the entry in the book called the Act Book, at *Llandaff*, did not render the document legally admissible as an examined copy of an act of probate.

Judgment was postponed, and the defendant was discharged on recognizance, with sureties to appear at the next assizes for *Monmouth*.

On the 15th *November*, A. D. 1851, this case was argued before Lord CAMPBELL C. J., MAULE J., PLATT B., TALFOURD J., and MARTIN B.

Gray, for the prisoner.

The question here is, whether the fact to which the defendant swore was material to the issue then being tried. The case finds that proof of the time of *Joseph's* death was material, and that proof of the probate of his will would have been relevant. The defendant swore that he had examined a paper, produced with the original will, and a memorandum at the foot, with a book
*305] called the Act Book. If this *had been true, the paper would not have been admissible in evidence, for the book did not contain the act of probate. As the will related to personalty, the probate itself was the proper evidence of it. The question raised is simply this, if a witness swears that he has examined a document, *not*

receivable in evidence, with a certain book, can that be said to be material to the issue? The time of *Joseph's* death was the issue; how can the fact, that the witness swore he had examined a paper, not receivable in evidence, with a certain book, be material to that issue?

MARTIN B.—Is the Act Book a register of probates?

Gray. The Act Book ought to contain the acts of the Court; but here it is a book having the *name* merely. It is not an act book containing the acts or judgments of the Court; it contains nothing but private memorandums. The witness did not swear that what he produced was an act of the Court.

TALFOURD J.—The matter in question being personalty, the probate of course was the proper evidence; but my impression at the trial was, that the witness swore what he thought would do to let in the paper in evidence.

MAULE J.—Did not the prisoner swear that he had examined the paper produced with the will, for the purpose of raising the question whether the evidence could be let in or not?

Lord CAMPBELL.—That the witness swore falsely in giving his evidence is admitted.

Gray. But its materiality to the issue is the question.

MAULE J.—Is that so? Is it not rather whether what is sworn is untrue and is material to a judicial proceeding?

Gray. I apprehend that to constitute perjury the false oath must be material to the *issue* then being *tried. It is not enough that the evidence has [*306 relation to the matter in issue; it must be material to the issue. It was contended when the defendant was tried, that what he had sworn was material for the jury who were to act on the evidence before them; and, secondly, that it was material for the Judge, who was

to say whether it was to be put to the jury or not. But it could not be material for the jury, for it was withdrawn from their consideration, and they could not legitimately act upon it; and, here the Judge was not a Judge of fact. There are cases where, upon questions arising incidentally during a trial, the Judge is Judge of the fact, and I admit that in such a case, if the witness swore falsely in his answers it would be perjury. But I submit that here there was no evidence for the Judge to decide upon.

LORD CAMPBELL.—It was proffered, Mr. *Gray*, to induce the Judge to admit secondary evidence.

Gray. This evidence was not on any issue of fact which the Judge had to try; he could not, in that stage, have received evidence in contradiction. It was merely evidence to be given to the jury through the Judge.

MAULE J.—Then if there should be a bill of exceptions in a case, whether false swearing be perjury or not, is to depend upon the judgment in the House of Lords? Here the defendant by means of a false oath endeavours to have a document received in evidence; it is, therefore, a false oath in a judicial proceeding; it is material to that judicial proceeding, and it is not necessary that it should have been relevant and material to the issue being tried. (a)

(a) Lord Coke (3 Inst. 165) thus defines perjury: "It is a crime committed when a lawful oath is ministered by any one that hath authority, to any person, in any judicial proceeding, who sweareth absolutely and falsely in a *matter material to the issue, or cause in question*, by their own act, or by the subornation of others;" and (p. 167) in commenting on the words marked in *italics*, he adds, "For if it be *not material, then, though false it be, yet it is no perjury, because it concerneth not the point in suit*, and therefore, in effect, it is extra-judicial. Also this act (5 Eliz. c. 9) giveth remedy to the party grieved, and if the deposition be not material he cannot be grieved thereby;" and in support of this, Lord Coke cites Bracton (lib. 4, c. 188). Hawkins, however, notices the following important qualification to the rule so laid down: "*Also it seemeth that any false oath is punishable as perjury, which tends to mislead the Court in any of their proceedings relating to a matter judicially before them, though it in no way affect the principal judgment which is to be given in the cause.*" (1 Hawk. P. C., bk. 1, c. 69, s. 3, ed. Leach.)

**Gray.* Where the Judge is trying a question of fact, there I admit perjury may be committed, though the question may not be material to the issue, because the false oath may mislead the Judge. [*307]

LORD CAMPBELL C. J.—You must look to the state of things when the document was tendered in evidence; the fact, that it was afterwards withdrawn is wholly immaterial.

Gray. When it turns out that it is inadmissible and immaterial it comes to nothing.

LORD CAMPBELL C. J.—Then, whether what is sworn is perjury or not, depends upon something which occurs *after* the perjury.

Gray. No. The character of what the prisoner swore was the same at the moment of swearing as afterwards. The Judge could have decided upon it the moment it was sworn. Whether it was, or was not true, does not affect the question of its admissibility. In all the cases where it has been held that the false swearing does not amount to perjury, unless it be material to the issue, no doubt the witnesses *intended* to deceive the jury, but that is not enough.

MAULE J.—Where do you find that laid down.

Gray cited *Rex v. Beneszech*, Peake Add. Ca. 93; *Rex v. Dunston*, Ry. & Moo. 109; 2 Russ. Cr. by Greaves, 596; *Rex v. Grieve*, 1 Lord Raym. 256. *In all the old cases the question was, whether what was sworn was material to the issue being tried. [*308]

LORD CAMPBELL C. J.—It was for the Judge to decide whether the evidence was admissible or inadmissible.

Gray. It was not for him to decide whether what the prisoner swore was true or false; but, whether the document were admissible in evidence. Suppose that what the prisoner swore was true?

MAULE J.—Suppose the Judge had left it to the jury

whether they believed the witness, and the evidence of the prisoner had gone to the jury with the rest of the evidence, and the jury had found their verdict upon it, would the false swearing then be perjury?

Gray. You must assume that a Judge will act legally. My argument rests on this, that the document was inadmissible in evidence, and that, by law, it never could get to the jury.

Lord CAMPBELL C. J.—Then you make the question whether the false oath were perjury or not, depend upon what took place after the prisoner left the witness box?

TALFOURD J.—If the document tendered in evidence had been a *copy* of the Act Book, it would have been admissible. (a)

Gray. Whether it may be desirable or not, that this ingredient in the offence of perjury should be done away with, is not now the question; but I submit that this evidence was inadmissible, that by law it never could get to the jury, the only judges of the fact in the case, that as a matter of fact it did not go to the jury; therefore, that it was not, and could not be, material to the issue, *309] and that unless it was *material to the issue being tried, although false, it did not amount to perjury.

Keating Q. C., for the Crown, was stopped by the Court.

Lord CAMPBELL C. J.—I am of opinion, that according to the law as it stood when this false swearing took place that the conviction was right. There was false swearing in a judicial proceeding. How can it be said not to have been material? It was necessary to prove that *Joseph* died before *Morgan*. Although the fact of *Joseph's* death had been proved by parol testimony, if evidence was given to shew that probate had been granted of *Joseph's* will

(a) See *Davis v. Williams*, 12 East, 232; 2 Pitt Tnyl. Ev. 1049.

while *Morgan* was still living, it would have been material in corroboration. With a view to have the copy of the will received in evidence, the defendant falsely swore that he had examined the paper produced with the original will at *Llandaff*, and the entry on it with the entry in the Act Book ; and, thereupon, the Judge said I will admit it, and if it had been read, it would have gone to the jury with the rest of the evidence in the case. Afterwards the document is withdrawn, but that cannot purge the false swearing committed by the defendant. It has been said that if the Judge were wrong in admitting the document in evidence, the defendant could not be convicted ; making the offence of perjury to depend upon whether a Judge were right or wrong in his direction on a question of law, and upon the decision of some nice point in a bill of exceptions, which might ultimately go to the House of Lords. We are all of opinion, as the evidence was given in a judicial proceeding with the view to the reception in evidence of a document which was material, and as that evidence was false, that all the ingredients necessary to constitute the crime of perjury are present, and that the conviction must be affirmed.

The rest of the Judges concurred.

[See note to *Overton's case*, 2 Moody C. C. 263.]

*REGINA v. THOMAS JOHNSON AND CHARLES [*310
WRIGHT.

Two men, *J.* and *W.*, acting in concert, and intending to defraud *S.*, entered the shop of *S.*, and by means of an artifice induced him to draw a cheque on his bank for 42*l.*, payable in the name of the prisoner *J.*, and then to accompany *J.* to the bank to see it paid, on the understanding that they were to return to finish the transaction by the payment to *S.* of forty-two sovereigns, and that the prisoner *W.* was to remain at the shop till *J.* and *S.* went and returned from the bank.

At the bank, by the desire of *S.*, the banker handed four ten pound notes and two sovereigns to the prisoner *J.* in the presence of *S.*

The prosecutor *S.*, and the prisoner *J.*, left the bank together and while on their way back to *S.*'s shop, *J.* went into an inn-yard, and promising to return immediately, absconded with the four ten pound notes, and the two sovereigns, which he and the prisoner *W.* (who in the meantime had gone off from the shop with the forty-two sovereigns) appropriated to their own use.

Held, that the misappropriation of the notes and two sovereigns was larceny, *S.* never having parted with the property and possession in them, and the prisoner *J.* having had no more than the bare custody of the money which he carried off.

At the General Quarter Sessions of the Peace held in and for the liberty of *Peterborough*, on the 3rd of *July*, A. D. 1851, *Thomas Johnson* and *Charles Wright* were indicted for stealing a banker's cheque for the payment of 42*l.*, four bank notes for the payment of 10*l.* each, and forty-four sovereigns, the property of *John Salinan*, and a verdict of guilty was recorded against them, subject to the opinion of the Court of Criminal Appeal on the following case :—

The prosecutor was seated at his shop door at *Peterborough*, on the 28th of *June* last, being market day. The prisoners placed themselves near him, and began a conversation about the sale of some beast and a pony ; they disagreed as to the price, *Johnson* asking 42*l.*, and *Wright* offering 40*l.*, when the prosecutor said, " split the difference." *Johnson* then *said *Wright* should *311] have them, were it not that his (*Johnson's*) father would be angry, as *Wright* had bought two cows over his head. *Wright* offered to give up the cows. The prosecutor again interposed, and the prisoners appeared to conclude a bargain that *Wright* should give *Johnson* 42*l.* for the beast and the pony, and that a half sovereign should be returned, provided the prosecutor would take the money from *Wright* and pay it to *Johnson*, as if he the prosecutor were the buyer, and so that *Johnson's* father might believe him to be the real purchaser. The

prosecutor consented to act as a "go-between." The parties then entered his shop, and *Wright* counted out forty-two sovereigns, forty of which passed through the prosecutor's hands to *Johnson*, and the other two laid upon the counter. *Johnson* laid down the forty sovereigns upon the counter also, with an explanation that his father, "who was an austere man," would not be satisfied without a cheque upon a banker, and requested the prosecutor to draw one accordingly. The prosecutor went round to his desk, leaving the prisoners with the sovereigns, drew the cheque payable to *Thomas Johnson* or bearer for 42*l.*, returned, and delivered it to *Johnson*. At this time he lost all thought of the money, and when he returned from his desk the sovereigns had disappeared. *Johnson* said, the prosecutor must go with him to the bank to draw the money. The prosecutor consented, and *Wright* was to remain in the shop until they returned "to finish the transaction." The prosecutor and *Johnson* left *Wright* alone at the shop door, and went to the bank together, when the cheque was cashed by the desire of the prosecutor in four notes of 10*l.* each, and two sovereigns. *Johnson* took the money, and came out of the bank, the prosecutor stopping for a minute or two to give some directions about his pass-book. *Instead of returning at once to *Wright* at the prosecutor's shop, *Johnson* requested the prosecutor to accompany him to an inn, where he said his father was, to satisfy him as to the business. They went into the inn-yard together, where *Johnson* called for his pony, at the same time slipping a half sovereign into the prosecutor's hand, saying, "I will go and turn out the beast," when he made off by the back entrance of the inn-yard, leaving the prosecutor with the half sovereign and the pony, which the ostler delivered to him, instead of returning with him to the shop (where *Wright* was to remain) "to finish the tran-

saction," as the prosecutor all along expected was to be done, and the forty-two sovereigns handed over to him. The prosecutor then, for the first time, suspected that he had been cheated. He made haste home with the pony, and found that *Wright* had fled and the forty-two sovereigns also; nobody but the prosecutor's daughter having been in the shop. The pony, with the bridle and saddle, were not worth more than fifty shillings. The prisoner *Johnson* was well dressed, like a farmer, and *Wright* like a jobber, and the prosecutor swore that he believed them to be respectable men, and engaged in a *bonâ fide* transaction, and that he assisted in it purely out of good nature, and was not to receive one penny for what he did. He also stated that he should have allowed *Johnson* to go to the bank alone with the cheque, he remaining with *Wright* and the sovereigns in the shop, had not *Johnson* requested him to go to the bank with him. The prosecutor expressly stated in his evidence that he expected *Johnson* was to come back with him to *Wright*, and that he was to have the forty-two sovereigns from *Wright*. That he did not expect *Wright* would "cut away," and did not consider *Johnson* at liberty to go off with the money before he, the prosecutor, had the sovereigns *in exchange. It was proved that during

*313] the same morning the prisoners attempted to engage another party in a similar transaction, and evidence was given to shew that the prisoners were acting in concert, and were apprehended in a gig together the same evening, about twenty miles from *Peterborough*, *Wright* having forty-five sovereigns found upon him.

The prisoners' Counsel contended that these facts would not justify a conviction for larceny. The Chairman, therefore, put the following questions to the jury:

First; did the prisoners throughout intend to get the

property of the prosecutor into their possession by fraud, and apply it to their own use?

Secondly; did the prosecutor intend to part with his property in the cheque and change until *Johnson* returned with them, and the prosecutor received the forty-two sovereigns?

Thirdly; if they should find that when the prosecutor gave *Johnson* the cheque he parted with the property in it, and the money obtained for it at the Bank, whose property were the forty-two sovereigns left upon the counter?

And he directed them, that if they found the first question in the affirmative, and the second in the negative, that the prisoners were in law guilty of larceny of the cheque and change; and further, that if they found the first two questions in the affirmative, and found also that the forty-two sovereigns left on the counter became the property of the prosecutor when the cheque was delivered to *Johnson* or cashed at the Bank, and were taken away by *Wright*, they were guilty of a larceny of those forty-two sovereigns. The jury found an original intent to defraud, followed by a general verdict of guilty, when the prisoners' Counsel applied for a case for the opinion of the Court *of Criminal Appeal, and [*314 thereupon the Chairman requested the jury to give distinct answers to the several questions before stated; and they answered the first question in the affirmative, and the second in the negative, and no reply to the third question was thereupon asked for. If, upon the facts stated and findings by the jury, the prisoners are guilty of larceny, the verdict is to stand. The prisoners were liberated on giving bail to appear and receive judgment.

On the 15th of *November*, A. D. 1851, this case was

argued before Lord CAMPBELL C. J., MAULE J., PLATT B., TALFOURD J., and MARTIN B.

Mellor Q. C., for the Crown. *Bliss* Q. C., for the prisoners.

Bliss Q. C. I submit that the prisoners are not guilty of larceny either of the forty-two sovereigns, or of the cheque, or of the Bank notes and two sovereigns, the change for the cheque. *First*, as to the forty-two sovereigns, there could be no larceny of them,—they never were in the possession of the prosecutor. They merely passed through his hand from *Wright* to *Johnson*, and the opinion of the jury was not taken as to these forty-two sovereigns.

Lord CAMPBELL C. J.—As to the forty-two sovereigns, there is no conviction.

Bliss. *Secondly*, as to the cheque, there was no larceny. There was no abstracting,—no felonious taking.

Lord CAMPBELL C. J.—You say that the cheque was not taken *invito domino*.

Bliss. The cheque was absolutely passed over to the prisoner *Johnson* by the prosecutor, and it was presented at the Bank at the prosecutor's request. There was no taking, without which there can be no *larceny. *315] That was done with the cheque which the prosecutor himself desired should be done with it, according to the purport, tenor, and effect of the cheque, which was payable to the prisoner *Johnson* by name. *Thirdly*, the Bank notes and the two sovereigns, the change for the cheque, never were the prosecutor's. This point is not determined by the finding of the jury, for the question is not what the prosecutor intended, but what the banker the prosecutor's agent, intended and did. The banker having the possession and authority, clearly intended to give the money, and did give it, to the prisoner.

MAULE J.—Is it not open to the prosecutor to say that the prosecutor and the prisoner went to the Bank together; that the prisoner had the cheque, which was the property of the prosecutor, and that the banker gave them, both being together, change for the cheque?

Bliss. If the prosecutor were induced to part with the possession only, and not the property, then this would no doubt be a case of larceny, but if he parted with both the property and the possession, then it would be a case of false pretences.

PLATT B.—The banker had the property of the notes and two sovereigns before in himself.

Bliss. And he transfers it to the prisoner. It makes all the difference that a third person hands over the notes.

Lord CAMPBELL C. J.—But the prosecutor was present; and whose the property was depends upon the understanding between the prosecutor and the prisoner.

Bliss. The notes were paid by the banker to the prisoner.

MARTIN B.—Suppose two gentlemen go to a bank. One of them has a cheque, and at the counter he gives it to the other, who hands it in and receives the [*316 *amount in change,—whose money would the change be?

Bliss. But if the prosecutor never had possession but by the prisoner, the offence would not be larceny, but embezzlement. In larceny the prosecutor must have had a corporal possession. (*Rex v. Bazeley*, 2 Leach, 835; 2 East P. C. 571; *Rex v. Waite*, 1 Leach, 28; *Rex v. Bull*, 2 Leach, 841; *Reg v. Watts*, 2 Den. C. C. 14.)

Mellor Q. C., for the Crown.

First, it is important to observe that it is found in the case that there was an original intention on the part of both the prisoners to deprive the prosecutor of his pro-

perty, by means of fraud; but the prosecutor never did part with the property, in the sense in which the cases go. If the prisoner, by means of a trick, obtained the cheque *animo furandi*, he is guilty of larceny.

LORD CAMPBELL C. J.—Although all that is done, is done as arranged by the prosecutor.

Mellor. Yes; but as it was done by fraud and trick, in contemplation of law, it was done against his will.

MAULE J.—Would that not put an end to all the distinctions between larceny and false pretences?

Mellor. I apprehend not. (2 *Russell on Crimes*, 23, 24). At the banker's, the prosecutor and the prisoner were present together. The cheque was as much in the possession of the prosecutor as the prisoner. The prisoner had but the "bare custody;" and Lord Hale says, such bare custody is not enough to prevent an offence from being larceny. According to the finding of the jury, the prosecutor did not intend to part with his property in the cheque till he had received forty-two sovereigns for it. There is no pretence that the prisoner received the cheque lawfully. By a trick, he induces the prosecutor to give it to him. *Possession rightly
 *317] means an *independent possession*, and there was no independent possession in the prisoner, either of the cheque or of the notes. (*Rex v. Spears*, 2 East P. C. 568; 2 *Russell on Crimes*, 23.) The prisoner had no independent possession of the notes and two sovereigns. They were the property of the prosecutor, and constructively the possession remained in him all the time. The prisoner had the custody of the notes and the two sovereigns, but the custody only, for the prosecutor never intended to part with the property or possession in them, until he received at his shop the forty-two sovereigns, as agreed upon. The prisoner never had an independent possession of the notes and two sovereigns, and unless

he had such an independent possession, his misappropriation of them was larceny.

Bliss replied, and cited *Rex v. Robson*, Russ. & R. 413; *Rex v. Nicholson*, 2 East P. C. 669; *Rex v. Bazeley*, 2 East P. C. 571; *Rex v. Tilley*, 2 Leach C. C. 662; *Rex v. Spears*, 2 Leach C. C. 825.

Our. adv. vult.

On the 22d of *November*, Lord CAMPBELL C. J. delivered the following judgment:—(a)

We are of opinion that the conviction is right, with respect to the bank notes and two sovereigns that were given in exchange for the cheque. It appears that the cheque was the property of the prosecutor, and the jury have found that the prisoners throughout intended to get the property of the prosecutor into their possession by fraud, and apply it to their own use, and that the prosecutor did not intend to part with his property in the cheque and the change for it until *Johnson* returned with the change, and until the prosecutor *received [*318 the forty-two sovereigns. The cheque then being the property of the prosecutor, he accompanied *Johnson* to the banker's to get it cashed; and it is expressly found that "the prosecutor and *Johnson* left *Wright* alone at the shop door and went to the Bank together, when the cheque was cashed, by desire of the prosecutor, in four notes of ten pounds each and two sovereigns." Now these words to which our attention was not particularly called on the argument of the case, are material, because they shew that the prosecutor continued to exercise a control over the transaction as owner of the cheque, and that it was upon his direction that the banker paid the

(a) The other Judges present were ALDERSON B., PLATT B., TALFOURD J., and MARTIN B.

cheque in four notes of ten pounds and two sovereigns. These notes and sovereigns were handed over to *Johnson* with the permission and by order of the prosecutor. *Johnson* was intrusted by the prosecutor to hold them, and merely to hold them; he had the custody of the money, and not the possession. The possession still remained in the prosecutor. The property remained in him, and he had never parted with the possession. *Johnson* received the notes and sovereigns with intent to steal them, and the case clearly amounts to larceny. The cases in 2 *East P. C.* are directly in point.

[False pretences and artifices in obtaining another's property by one in pursuance of a felonious intent, will constitute a larceny, provided no temporary trust or possession was extended to the party. *Wilson v. The State*, 1 Porter, 118. Where one, having only the care, charge or custody of property for the owner, converts it, *animo furandi*, it is larceny; the possession, in judgment of law remaining in the owner until the conversion. *The People v. Call*, 2 Denio, 120; *Starkie's case*, 7 Leigh, 752.]

*319]

*REGINA v. JAMES SHRIMPTON.

If the prisoner, on cross-examination of the witnesses for the prosecution, elicit evidence as to his good character it is "giving evidence" within the proviso in the stat. 14 & 15 *Vict. c. 19*, s. 9, and the prosecutor can, in answer thereto give proof of the prisoner's previous conviction.

At the General Quarter sessions of the peace for the county of *Worcester*, held on the 13th day of *October*, 1851, *James Shrimpton* was indicted for felony.

The indictment contained a statement of the previous conviction of the prisoner in the year 1838.

In the course of the trial, *John Roberts* was examined as a witness for the prosecution. On cross-examination by the Counsel for the prisoner, *John Roberts* stated that he had known the prisoner for six or seven years last

past, and that during that time the prisoner had borne a good character for honesty.

The counsel for the prosecution thereupon claimed, under the provisions of the statute 14 & 15 *Vict.* c. 19, s. 9, to give evidence of the previous conviction of the prisoner in 1838, as mentioned in the indictment.

This evidence was objected to by the prisoner's Counsel as inadmissible: first, because the evidence of the good character of the prisoner, elicited from the witness *Roberts*, was confined to a period between the years 1844 and 1851; and, therefore, evidence of the prisoner's conviction in 1838 was not in answer thereto: secondly, because *Roberts* being a witness for the prosecution only, the prisoner did not, by the answers of *Roberts* to questions put to him in cross-examination, give evidence of his (the *prisoner's) good character within the meaning of [*320 the 14 & 15 *Vict.* c. 19, s. 9.

The Court overruled the objection, and the conviction of the prisoner in 1838 was thereupon given in evidence before the verdict was returned. The prisoner's Counsel addressed the jury for the prisoner, but called no witnesses on his behalf.

The prisoner was found guilty and sentenced to nine month's imprisonment. But the Court of Quarter Sessions reserved for the opinion of her Majesty's Judges the question of law, whether, under the circumstances above stated, proof of the said previous conviction of the prisoner was properly received in evidence before the verdict of guilty was returned. If the said evidence was properly received, the conviction to be affirmed; if otherwise, the conviction and judgment thereon to be reserved.

On the 22nd *November*, A. D. 1851, this case was argued before Lord CAMPBELL C. J., ALDERSON B., PLATT B., TALFOURD J., and MARTIN B.

Selfe, for the prisoner.

The evidence of the previous conviction was improperly admitted.

LORD CAMPBELL C. J.—You say that the prisoner did not “give evidence” of his good character.

Selfe. Yes, and I also say that evidence of the conviction in 1838 was not “in answer thereto.” The question depends upon the construction of 6 & 7 Wm. 4, c. 111, and of 14 & 15 Vict. c. 19, s. 9. The first statute relating to previous convictions was the 7 & 8 Geo. 4, c. 28, s. 11. Some difference of opinion prevailed as to the course to be pursued under that statute, but it was, after some time, settled that the allegation of a previous conviction was part of the *indictment, and that the
 *321] prisoner was to be called upon to answer that charge *at the same time* as the subsequent felony for which he was indicted. This was considered a hardship upon prisoners, and the stat. 6 & 7 Wm. 4, c. 111, was passed to remedy it. The preamble recites, that doubts may reasonably be entertained, whether the practice of informing the jury of the fact of a previous conviction, was consistent with a fair and impartial inquiry as regards the charge of felony which the prisoner had to answer; and then it is enacted, that it shall not be lawful on the trial of any person for any subsequent felony, to charge the jury to inquire concerning such person’s conviction, until after they shall have inquired concerning such subsequent felony, and shall have found such person guilty of the same. The proviso then follows, as to the proof of the previous conviction before the verdict of the jury, where the prisoner should “give evidence” of his or her good character. The proviso of 14 & 15 Vict. c. 19, s. 9,(a)

(a) 14 & 15 Vict. c. 19, s. 9. “Provided, that if upon the trial of any person for any such subsequent offence as aforesaid *such person shall give evidence of his good character*, it shall be lawful for the prosecutor, *in answer thereto, to give evi-*

is in effect the same as the proviso in 6 & 7 Wm. 4, c. 111, and as the last named act was passed to remedy a hardship, your Lordships will give it a liberal interpretation.

LORD CAMPBELL C. J.—We shall give such an interpretation to it as meets the intentions of the Legislature.

Selfe. There is still a hardship upon a prisoner. The jury are present at the *arraignment*, and they hear *the prisoner called up to the bar and arraigned [*322 on the whole charge, including the count for the previous conviction, before he is given in charge.

ALDERSON B.—You give the jury credit for attending to matters which are not before them.

LORD CAMPBELL C. J.—The jurors then present are not a jury in the case.

Selfe. It cannot be said that the prisoner gave evidence as to his character.

ALDERSON B.—The prisoner raises the question of character, and the evidence of his former conviction is brought to shew what his character really is.

LORD CAMPBELL C. J.—The question in issue is the good character of the prisoner,—whether or not he was likely to commit the offence of which he was charged. Surely, whether the prisoner had been previously convicted is relevant to that.

Selfe. Suppose the evidence was that he had been convicted of rape?

ALDERSON B.—If the conviction proved were a conviction for rape, you would have told the jury that it had nothing to do with his character for honesty.

LORD CAMPBELL C. J.—It must be “in answer thereto.”

Selfe. Then I submit that the answers given by the

dence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction or convictions at the same time that they inquire concerning such subsequent offence.

witness, respecting the character of the prisoner, were not evidence given by the prisoner, within the meaning of the statute.

LORD CAMPBELL C. J.—It was evidence given in answer to a question from the prisoner's Counsel.

ALDERSON B.—The plain meaning of the words "give evidence," in the act of Parliament is, if evidence be elicited as to the prisoner's good character, either by himself or his Counsel.

Selfe. It would have been very easy for Parliament *323] to have said, "if *any evidence be given.*" Can it be said that the prisoner has here given evidence, so as to entitle the Crown to a reply?

LORD CAMPBELL C. J.—The Crown has no right of reply in such a case. The prisoner does not give evidence within the meaning of the resolutions of the Judges on the Prisoners' Counsel Act.

Selfe. According to the resolution of the Judges referred to by your Lordship, to *give evidence* on the part of the prisoner, is to *call witnesses*. Both in this Court and out of this Court, that is the general acceptance of the meaning of giving evidence. The case of *R. v. Gadbury*, 8 Car. & P. 676, where PARKE B.(a) held differently, was a dictum, not a decision. Suppose, that a witness for the prosecution is asked by the prisoner's Counsel, some question which has no reference to character, and he should happen to say something favourable to the prisoner's character, could the prisoner, under

(a) The case of *Reg. v. Gadbury* was tried at the Central Criminal Court, A. D. 1838, before PARKE B. Referring to the proviso in 6 & 7 Wm. 4. c. 111, his Lordship said, "The words are, shall '*give evidence*,' and not '*call witnesses*,' and I am of opinion that the rule should be so laid down; and it is important that in future it should be understood to be so, and should be generally known." PARKE B., accordingly held, that where, by cross-examination of witnesses for the prosecution, evidence as to character was elicited by a prisoner, proof of the prisoner's previous conviction was admissible in answer thereto.

such circumstances, be said to give evidence as to his character?

Lord CAMPBELL C. J.—That would raise a different question. I should not, in such a case, admit evidence of a previous conviction.

No Counsel appeared for the Crown.

Lord CAMPBELL C. J.—We are all agreed that this conviction is right. It appears that on the trial, *John Roberts* was examined as a witness for the prosecution, and that on cross-examination by the Counsel for the *prisoner, he was asked as to the general character of the prisoner for honesty. Now let us see what [*324 are the words of the Legislature:—"Provided that if upon the trial of any person for any such subsequent offence as aforesaid, such person shall *give evidence* of his good character, it shall be lawful for the prosecutor *in answer thereto*, to give evidence of the conviction of such person for the previous offence or offences, before such verdict of guilty shall have been returned, and the jury shall inquire concerning such previous conviction or convictions, at the same time that they inquire concerning such subsequent offence." The object of the Legislature in passing this law, was to defeat the scandalous attempts we have all seen made by persons repeatedly convicted, to establish a good character for honesty before the jury, either by calling witnesses, or by cross-examining the witnesses for the prosecution. The mischief is as great whether such evidence be elicited from the witnesses for the Crown, or for the prisoner. Indeed the jury are more likely to be imposed upon by testimony, in favour of the prisoner's good character given by the witnesses for the prosecution, than if it came from witnesses called by the prisoner. The act of Parliament would have been most defective, if it had allowed evidence of the prisoner's good character to be given, and had not made

provision for allowing the jury to know that, in fact, he had been formerly convicted of felony. The prisoner, by means of his Counsel, gave evidence of his good character; was it not therefore lawful for the prosecutor to shew what the prisoner's character really was? We are of opinion that it was; and, it seems to me to be the natural and necessary interpretation to be put upon the words of the proviso in the statute, that if, whether by himself or by his Counsel, the prisoner attempts to *325] prove a good character for *honesty, either directly, by calling witnesses, or indirectly, by cross-examining the witnesses for the Crown, it is lawful for the prosecution to give the previous conviction in evidence for the consideration of the jury.

ALDERSON B.—The words of the Act 14 & 15 Vict. c. 19, are, as in 6 & 7 Wm. 4, c. 111, if the prisoner shall “give evidence,” not if the prisoner shall *call witnesses*.

The rest of the Judges concurred.

REGINA v. WILLIAM VANN.

A parent who has not the means of providing burial for the body of his deceased child, is not liable to be indicted for a misdemeanor in not providing for its burial, even though a nuisance be occasioned by allowing the body to remain unburied, and although the Poor Law authorities of the union have offered him money to defray the expenses of burial, by way of loan, as he is not bound, under such circumstances, to contract a debt.

William Vann, the defendant in this case, was tried before *J Hildyard*, Esq., the Recorder of the borough of *Leicester*, at the last *Michaelmas* Quarter Sessions of the peace for the said borough, for a nuisance in having refused and neglected to bury the dead body of his deceased child, whereby and by reason of the decomposition whereof various noisome stenchs arose, and the air was

thereby greatly infected and rendered unwholesome, to the great damage and common nuisance of the Queen's subjects.

The defendant, at the time of the decease of his child, which took place on the 17th of *August* last, was a pauper who had been receiving parochial relief from the parish of *St. Margaret* in the *Leicester* Union, and soon after the child's death he applied to the relieving officer of that parish for assistance to bury the child. It appeared in evidence that an order of the Poor Law Commissioners, under the provisions of *the statute 4 & 5 Wm. 4, c. 76, s. 58, had been issued to the guard- [*326
ians of the *Leicester* Union, which provided, that in certain cases relief might, if the guardians thought fit, be given by way of loan, and that one of such cases was, "where the pauper should receive relief for the purpose of defraying the expenses, either wholly or in part, of the burial of any of his family." It further appeared in evidence, that the guardians had laid down a rule (which rule was printed and circulated in the Union), "that the head of the family, or person applying for the assistance of the parish in burying any poor person, must sign an undertaking to repay the expenses incurred, in case the guardians shall deem him or her able to do so." It further appeared, that at the time the defendant applied to the relieving officer for assistance to bury his child, he was required, in conformity to the rule laid down by the guardians, to sign a document to the following effect:—

"I, *William Vann*, the undersigned, do hereby agree, on demand, to repay to the guardians of the poor of the *Leicester* Union the sum of seven shillings, advanced to me by way of loan in payment for coffin and ground for my child."

The defendant refused to sign this document, and the relieving officer refused to render him any assistance in

the burial of the child. It was proved that the defendant removed the body of the child from his house to a yard in the neighbourhood, and that the stench arising from it amounted to a nuisance.

The learned Recorder told the jury that the defendant was bound to provide for the burial of his deceased child, if he could in any lawful way procure the means for so doing; and that, as the guardians were entitled under the order of the Poor Law Commissioners to give relief *327] for the purposes of burial by way of loan, *and as the defendant had been offered such relief in that manner, he was bound to receive it, and that consequently he was not excused from his liability to provide for the interment of his deceased child, and was liable to be convicted upon the indictment for the nuisance, if the jury believed the facts. The jury found the defendant guilty.

The Recorder reserved a case for the opinion of the Court of Criminal Appeal, whether the defendant, by refusing to incur the obligation of a debt, rendered himself, as a consequence of that refusal, liable to a prosecution for the above misdemeanor. The judgment upon the conviction was postponed, and the defendant was discharged, on recognizance of bail to appear and receive judgment at the sessions next after this case should be decided.

On the 22d *November*, A. D. 1851, this case was argued before Lord CAMPBELL C. J., ALDERSON B., PLATT B., TALFOURD J., and MARTIN B.

O'Brien, for the Crown.

PLATT B.—What public duty has a man to incur a debt?

O'Brien. I submit that it was the duty of the pri-

soner to provide for the burial of his deceased child, if he could have done so by any lawful means.

LORD CAMPBELL C. J.—Is it an indictable misdemeanor to refuse to incur a debt?

O'Brien. It is an indictable offence to neglect to obtain burial for a man's child, where he can obtain it.

LORD CAMPBELL C. J.—No doubt a man is bound, *if he has the means*, to give his deceased child Christian burial; (a) but unless he has the means, he is not indictable for neglecting to do so.

**O'Brien.* Then I submit that he *had* the means of procuring the child's burial. [*328]

ALDERSON B.—Not without getting into debt.

O'Brien. The prisoner is also liable for the nuisance occasioned by the removal of the dead body to the yard.

PLATT B.—Have you a count in the indictment for that?

O'Brien. Yes. (b)

LORD CAMPBELL C. J.—The only question reserved for our consideration is, whether the defendant, by refusing to incur the obligation of a debt, rendered himself, as a consequence of that refusal, liable to a prosecution for a misdemeanor?

O'Brien. Then I shall confine myself to that point; and I contend that the prisoner *had* the means of providing for the burial of his child, inasmuch as he was offered the money necessary for the purpose, as a loan.

LORD CAMPBELL C. J.—If a Jew were to offer him the money at fifty per cent., was he bound to accept it?

(a) In *Rex v. Lynn*, 2 T. R. 734; 1 Leach, 497, which was an indictment for taking up dead bodies, the Court observed, "that the offence was cognizable in a criminal Court, as being highly indecent, and *contra bonos mores*, and the bare idea alone of which Nature revolted." See also MS. note by ABNEY J., *Willes*, 537. And see *Young's case*, 2 T. R. 734, which was a conspiracy to prevent the burial of a person who died in a workhouse. As to the burial of shipwrecked persons, and the punishment of parish officers neglecting for twelve hours to remove such bodies after notice, see 48 *Geo.* 3, c. 75, s. 7.

(b) See p. 331.

O'Brien. The same duty rests upon a man to provide for the burial of his deceased child as to afford maintenance to a living one. Now, if a baker had offered to supply bread to a man for his family, on credit, on the condition that the man should pay for it when he had it in his power to do so; and if the man said, "No," and, rather than accept the bread on credit, had allowed his children to perish of hunger, would he not have been *329] liable to be punished criminally *for neglecting to avail himself of the means offered to him? Again, if the prisoner's child had died in the house of another person, and that person had defrayed the expenses of the burial, would not the father have been liable to him for such expenses? In the case of *Ambrose v. Kerrison*, 20 Law Journal, (N. S.) C. P. 135, it was held, that where a husband neglected to provide for the burial of his deceased wife, and another person had undertaken to provide for the burial of the body, the husband was liable to be sued for the amount.

LORD CAMPBELL C. J.—But has the prisoner committed a *crime*, if he has not the means of providing burial for the child?

O'Brien. That he had not the immediate means can make no difference when he could have procured them. The means were offered to him.

TALFOURD J.—The document, which the prisoner was required by the relieving officer to sign, was a promise to pay *on demand*.

O'Brien. This is a question of nuisance.

LORD CAMPBELL C. J.—The question is one of ability. It was not left to the jury whether the prisoner had the means to provide for the burial of his child, but they were directed and peremptorily told, that he was bound to receive the loan offered to him by the relieving officer.

O'Brien. It is found in the case that the Poor Law Commissioners had laid down a rule authorizing the guardians of the union to advance money, by way of loan, to persons in indigent circumstances, to assist them in paying the expenses of the burial of any of their family, and that, in conformity with that rule, and by the authority of the guardians, the relieving officer offered the prisoner money sufficient for the burial of his child. He refused to accept *the loan, and by his refusal he voluntarily placed himself in circumstances of inability. [*330 But, I submit, that he had the means of providing for the burial within his power, and that, therefore, he is liable for the nuisance occasioned by allowing the dead body of his child to be exposed without Christian burial.

No Counsel appeared for the prisoner.

Lord CAMPBELL C. J.—I am clearly of opinion, that on the question left to our consideration the conviction was wrong, and that the direction of the Recorder to the jury cannot be supported. He told them, which is perfectly true, that the prisoner, *if he had the means*, was bound to provide for the burial of his deceased child; but he went on and told the jury that the defendant was bound to provide for the burial of his deceased child, if he could in any lawful way procure the means for so doing, and that as the guardians were entitled under the order of the Poor Law Commissioners to give relief in that manner, the prisoner was bound to receive it, and that consequently he was not excused from his liability to provide for the interment of his deceased child. Therefore, it is laid down that in point of law, if the jury believed the witnesses, they were bound to find the prisoner guilty. It is true, that a man is bound to give Christian burial to his deceased child, if he has the means of doing so; but he is not liable to be indicted for a nuisance, if he has not the means of providing burial for it. He cannot sell the body, put

it into a hole, or throw it into the river ; but unless he has the means of giving the body Christian burial, he is not liable to be indicted, even though a nuisance may be occasioned by leaving the body unburied, for which the parish officer(a) would probably be liable. It *has *331] been contended that the prisoner was bound to incur a debt, and thereby take away the means of maintaining his family. We are all of opinion that he was not bound to accept the loan on the terms offered proposed to him, and thus to contract a debt which would render him liable to be proceeded against, and to lose his liberty.

ALDERSON B., PLATT B., TALFOURD J., and MARTIN B., concurred.

(a) 7 & 8 Vict. c. 101, s. 31, provides, that it shall be lawful for guardians, or where there are no guardians, for the overseers to bury the body of any poor person which may be within their parish or union respectively, and to charge the expense thereof to any parish under their control to which such person may have been chargeable, or in which he may have died, or otherwise in which such body may be.

Copy of Indictment.

Borough of } The jurors for our Lady the Queen upon their oath present that
Leicester, } whereas heretofore to wit on the eighteenth day of *August* in
to wit. } the fifteenth year of the reign of our Sovereign Lady *Victoria*
William Vann late of the parish of *Saint Margaret* in the borough of *Leicester*
labourer was the father of a certain child then lately deceased and had then and there the care and custody of the dead body thereof. And whereas on the day and year aforesaid at the parish aforesaid in the borough aforesaid it became and was the duty of the said *William Vann* the father of the said child lately deceased as aforesaid the dead body thereof to bury and inter according to the rules of public decency.

And the jurors aforesaid upon their oath aforesaid do further present that he said *William Vann* having as aforesaid the care and custody of the dead body of his child then lately deceased being an evil disposed person and in disregard of the laws and customs of this realm afterwards to wit on the nineteenth day of *August* and at divers other times in the year aforesaid at the parish aforesaid in the borough aforesaid with force and arms against his duty in that respect the said dead body did unlawfully wrongfully and wilfully refuse omit and neglect to bury and inter whereby and by reason of the decomposition of the said dead body

while in his care and custody as aforesaid and while remaining unburied in the dwelling-house of him the said *William Vann* there situate and being divers various noxious injurious and unwholesome smells and stench did then and there arise and issue therefrom and thereby the air was greatly infected and corrupted and was rendered and became for several days offensive unwholesome injurious and dangerous to health *to the great damage and common [*332 nuisance of all the liege subjects of our Lady the Queen there inhabiting being and residing and going returning and passing to the evil example of all others in like case offending against the peace of our said Lady the Queen her crown and dignity.

2d Count. And the jurors aforesaid upon their oath aforesaid do further present that *William Vann* late of the parish of *Saint Margaret* in the borough of *Leicester* labourer on the twentieth day of *August* in the fifteenth year of the reign of our Sovereign Lady *Victoria* having the care and custody of the dead body of a certain child then lately deceased to wit of the child of him the said *William Vann* on the day and year last mentioned at the parish aforesaid in the borough aforesaid the said dead body with force and arms and against his duty in that respect unlawfully did refuse omit and neglect to bury and the said dead body did then and there remove from the dwelling-house of him the said *William Vann* there situate to a certain public place to wit a public yard there situate near to and adjoining divers public streets being the Queen's common highways and also near to and adjoining the dwelling-houses of divers liege subjects of our said Lady the Queen there situate and the said body so removed as aforesaid and so as aforesaid in his care and custody did then and there unlawfully and injuriously permit and cause to be and remain in the said public yard there situate as aforesaid for a long space of time to wit for and during the space of six days whereby and by reason of the noxious smells stench and vapours arising and issuing from the said dead body during the time aforesaid the air became and was greatly infected and corrupted and became and was rendered offensive injurious and unwholesome to the great damage and common nuisance not only of all the liege subjects of our said Lady the Queen then and there being inhabiting and dwelling but also of all other liege subjects of our said Lady the Queen near there being inhabiting and dwelling but also of all other liege subjects of our said Lady the Queen in by and through the said public yard and in by and through the other said public streets and highways near thereto going returning passing repassing and labouring to the evil example of others in the like case offending and against the peace of our said Lady the Queen her Crown and dignity.

3d Count. And the jurors aforesaid upon their oath aforesaid do further present that *William Vann* late of the parish of *Saint Margaret* in the borough of *Leicester* labourer on the day and year last before mentioned having the care and custody of the dead body of a certain child then lately deceased to wit the child of him the said *William Vann* at the parish aforesaid in the borough aforesaid the said dead body with force and arms did unlawfully wilfully and against his duty in that respect omit neglect and refuse to bury the said dead body unlawfully injuriously and against the rules of public decency in that respect in a certain public place to wit a public yard there being and situate and near unto divers public streets being the Queen's common highways and also near unto the dwelling-houses of divers liege subjects of our said Lady the

*333] Queen there situate and *being did then and there keep and retain and cause to be kept and retained for the space of several days and the said dead body so kept and retained by him the said *William Yann* as aforesaid became and was putrid by reason of which said premises or during the time aforesaid divers noxious unwholesome and offensive smells stench and vapours were from thence emitted and issued so that thereby the air then and there was rendered and became offensive injurious and unwholesome and thereby continued during the time aforesaid to be offensive injurious and unwholesome and to the great damage and common nuisance of all the liege subjects of our said Lady the Queen there inhabiting being and residing and going returning and passing through the said streets and highways and against the peace of our said Lady the Queen her Crown and dignity.

REGINA v. SAMUEL AMOS WORTLEY.

The prisoner entered into the following agreement with the prosecutor:

"*S. W.* engages to take charge of the glebe-land of the Rev. *J. B. B. C.*, his wife undertaking the dairy and poultry, &c., at fifteen shillings a week, till *Michaelmas* 1850, and afterwards at a salary of 25*l.* a-year, and a third of the clear annual profits after all expenses of rent, rate, labour and interest on capital, &c. are paid, on a fair valuation, made from *Michaelmas* to *Michaelmas*. Three months' notice on either side to be given, at the expiration of which time the cottage to be vacated by *S. W.*, who occupies it as bailiff, in addition to his salary. *March* 12, 1850. (Signed) "*J. B. B. C.*"
"*S. A. W.*"

Held, that this was not a contract of partnership, but an agreement for the hire of a labourer, and that being within the exemption of the Stamp Act, it was admissible in evidence unstamped.

2. The prisoner, in accounting with the wife of the prosecutor, as he was accustomed to do, on the 4th of *October*, denied the receipt of two sums of money, which he had received on account of his master, and appropriated them to his own use: *Held*, that this was embezzlement, although *Michaelmas* was the time agreed upon when a valuation was to be made, and the profits were to be ascertained.

THE prisoner was tried at the Quarter Sessions for the county of *Somerset*, held at *Taunton*, on the 14th of *October*, A. D. 1851, on an indictment which charged that
*334] he, being a servant to the Rev. *Joseph Butterworth*
**Bulmer Clarke*, on the 26th *September*, A. D. 1851, and on the 1st *October*, A. D. 1851, did feloniously em-

bezzle two several sums of money, one of 28*l.* 12*s.*, and the other of 18*l.* 11*s.*, the property of his said master.

It appeared at the trial, that the prisoner on the 12th of *March*, 1850, entered into the following agreement with the prosecutor, which being duly proved, was tendered in evidence. It was unstamped:—

“*Samuel Wortley* engages to take charge of the glebe-land of the *Rev. J. B. B. Clarke*, his wife undertaking the dairy and poultry, &c., at fifteen shillings a week, till *Michaelmas*, 1850, and afterwards at a salary of 25*l.* a year, and a third of the clear annual profit after all expenses of rent, rate, labour, and interest on capital, &c., are paid, on a fair valuation made from *Michaelmas* to *Michaelmas*. Three months’ notice on either side to be given, at the expiration of which time the cottage to be vacated by *Samuel Wortley*, who occupies it as bailiff, in addition to his salary. *March* 12th, 1850.

(Signed)

“J. B. B. CLARKE.

“S. A. WORTLEY.”

The prisoner’s Counsel objected to its reception in evidence, on the ground that it required a stamp, either as a contract for a partnership, or an agreement not within the exemption in the Stamp Act. The objection was overruled, and the document admitted in evidence.

It was proved, that the prosecutor was the owner of a farm, consisting of certain glebe-lands, and that on the 12th of *March*, 1850, the prisoner entered into the management of them on the terms of the said agreement, and that he continued to manage them on the same terms up to the 4th of *October*, 1851, when *he absconded. He had been instructed to account [*335 for all sums received, and did so account at certain stated periods with the wife of the prosecutor, except as herein-

after mentioned. The stock, crops, &c., on the farm, were purchased with the money of the prosecutor, the prisoner not contributing to the capital employed in carrying on the business. In the course of the business on the days specified in the indictment, he received the two several sums in the indictment mentioned, for a portion of a quantity of wheat which the prisoner had purchased by public auction, in the course of his management of the business, in a growing state, and afterwards cut and thrashed, and which standing wheat so purchased by the prisoner, was paid for by a bill of exchange drawn by the auctioneer upon, and accepted by the son of the prosecutor, on the prosecutor's behalf. And the prisoner having on his accounting subsequently with the prosecutor's wife, denied the receipt of such two sums applied them to his own use. At the close of the case, it was objected that the prisoner did not stand in the relation of servant, but of partner to the prosecutor, and, at all events, that the prosecutor had no right to call on the prisoner to account till *Michaelmas*, 1851, when the respective shares, rights, and interests of the prosecutor and prisoner, in the profits and property was to be ascertained, and that therefore the indictment failed. The Court overruled the objections, directing the jury that the agreement created the relation of master and servant between the prisoner and the prosecutor, and not that of partner; and that the prisoner's denial of the receipt, although there had been no valuation of the property or the profits ascertained, was sufficient to constitute the offence charged.

The jury convicted the prisoner. The Court respited
*336] *the judgment, and remanded the prisoner to the next Session, reserving for the opinion of the Justices of either Bench, and of the Barons of the Exchequer, the following questions:—

First; Whether the agreement was properly received in evidence without a stamp?

Second; Whether the direction to the jury that the agreement created the relation of master and servant, and not that of partner, was correct?

And third; Whether the denial of the receipt by the prisoner under the circumstances, constituted the crime of embezzlement as charged in the indictment?

On the 22nd of *November*, A. D. 1851, this case was argued before Lord CAMPBELL C. J., ALDERSON B., PLATT B., TALFOURD J., and MARTIN B.

Phinn, for the Crown.

Lord CAMPBELL C. J.—Do you contend that the instrument was admissible in evidence without a stamp?

Phinn. Yes; I say that this is a case within the exemption in the Stamp Act, and that even in a civil action the agreement would be admissible without a stamp; but if it were necessary, it might be contended that the Stamp Act does not apply to cases to which the Crown is a party.

Lord CAMPBELL C. J.—The authorities are collected in *Roscoe's Crim. Evid.* 3rd ed., p. 211, from which it would appear that as a general rule an instrument by law requiring a stamp, is not admissible in evidence in criminal cases without a stamp. Where an instrument is charged to be a forgery, then, indeed, it may be given in evidence unstamped; but it is otherwise where it is offered as a genuine document to prove a contract.

Phinn. The cases are principally decisions of single *Judges, and they all rest on the authority of *Rex* [*337 v. *Gilson*, Russ. & Ry. 138 (a); but it is not ne-

(a) *Rex v. Gilson*, six of the Judges held that the unstamped memorandum had been improperly admitted in evidence against the prisoner, while five of the Judges were of a contrary opinion. The case is also reported in 2 *Leach*, 1007; 1 *Taunt.* 95.

cessary to argue the point now, as I submit that the agreement required no stamp, it being within the exemptions in the Stamp Act, as an agreement for the hire of a menial servant or labourer. It created a contract for service, not a partnership; the prisoner was a menial servant or labourer, not a partner. The question is not whether, as between *third parties*, the prosecutor and the prisoner might have been held to be partners, but whether, *inter se*, they were partners. In the case of *Mair v. Glenzie*, 4 M. & S. 244, where there was an agreement that the captain of a ship should receive a certain share of the produce of the voyage in lieu of wages, it was held that that did not create a partnership. In that case Lord *Ellenborough* said, "It has been contended that the captain was virtually a partner, but upon what grounds has it been so contended? The ground is, because payment of the captain's wages was to depend, as to its amount, upon a reference to the value of the cargo; but according to that mode of argument, every seaman on a *Greenland* voyage would become a partner in the fishing concern. There is no pretence, therefore, for saying that the captain was a partner because his wages were to be regulated and paid by reference to a calculation on the profits of the adventure."

MARTIN B.—You have to make out that the prisoner was an artificer, a menial servant, or labourer.

Phinn. I am contending that there was no contract of partnership between the prosecutor and the prisoner.

*338] I shall also contend that he was a menial *servant, or a labourer. The agreement did not create a partnership.

PLATT B.—You say that there was no community of profit and loss between them.

Phinn.—There must be a community of profit and loss

to constitute a partnership. (*Rex v. Hartley*, Russ & Ry. 139; Story on Partnership, 74.)

Lord CAMPBELL C. J.—There are many cases which shew that a participation in profits alone does not create a partnership.

Phinn. In the case of *Dry v. Boswell*, 1 Camp. 329, which was an agreement between the owner of a lighter and a lighterman, that the latter should have for working the lighter, half the gross earnings, it was held, that this did not amount to a partnership; Lord *Ellenborough* in that case observing, “that this was only a mode of paying the defendant wages for his labour, and was different from the participation of profits and loss, so that under these circumstances no partnership could be considered as existing between him and the owner of the lighter.” The authority of *Dry v. Boswell* was questioned by Mr. Justice *Story*; but there the question was one between third parties; while this is a question *inter se*. You must see what the intention of the parties was, and I submit that it is evident, from all the circumstances, that there was no intention on their part of entering into a contract of partnership. *Secondly*, I submit that the prisoner was a menial servant, or labourer, within the exemption in the Stamp Act. Lord *Coke* defines a menial as one dwelling *inter mœnia*; but Lord *Abinger*, in the case of *Nolan v. Ablett*, 2 C. M. & R. 54, held that to constitute a menial servant, actual residence within the walls of his master’s dwelling was not essentially necessary. Lord *Abinger*, in giving judgment, said, “I should have been inclined to have told the jury *that the plaintiff was a menial servant; for though he did not live [*339 in the defendant’s house, or within the curtilage (*intra mœnia*), he lived in the grounds within the domain.” In the case of *Wilson v. Zuleta*, 16 L. J., Q. B. 49, the stoker of a steamer was held to be a labourer or artificer

within the exemption in the Stamp Act, 55 *Geo.* 3, c. 184, Sched. Part. 1.

Lord CAMPBELL C. J.—Why is not the prisoner a labourer?

Phinn. Under the Statute of Additions it would be a good addition. I submit that he was a labourer, and therefore, that, the agreement being within the exemption in the Stamp Act, it was admissible in evidence without a stamp.

No Counsel appeared for the prisoner.

Lord CAMPBELL C. J.—I am of opinion that this conviction ought to be supported. Assuming (a) that this instrument, if it had created a partnership, would not be receivable in evidence in a criminal case without a stamp. I think that it would, even in a civil action, be admissible unstamped, it being within the exemption in the Stamp Act, as an agreement for the hire of a labourer. The second question is, did this instrument create a partnership, or did it create the relation of master and servant? It did not create a community of profit and loss: *inter se*, the prosecutor and prisoner were not partners, and I am of opinion that the prisoner was a labourer and not a partner. The third question reserved for us is, whether the denial of the receipt of the money by the prisoner under the circumstances mentioned in the case *340] amounted to embezzlement. *There is abundant authority to shew that a denial of, or not accounting for, the receipt of money under such circumstances, constitutes the offence of embezzlement.

(a) In the course of the argument the Lord Chief Justice, referring to the cases collected in *Roscoe's Crim. Evid.*, ed. *Granger*, p. 211, expressed an opinion that in some future bill for the improvement of the criminal law it would be worthy of consideration whether it would not be desirable to render documents admissible in evidence in criminal cases *unstamped*.

ALDERSON B.—I think that the prisoner was not a servant, but that he was a labourer.

PLATT B., TALFOURD J., and MARTIN B. concurred.

REGINA v. THE INHABITANTS OF THE TOWNSHIP OF WAVERTON.

After verdict, defective averments in the second count of an indictment may be cured by reference to sufficient averments in the first count.

THIS was an indictment for a nuisance in not repairing a highway, found at the *Cumberland* Summer Assizes, A. D. 1850. It was removed by *certiorari* into the Queen's Bench, and was tried at the Summer Assizes for the county of *Cumberland*, held at *Carlisle*, before Mr. Justice WILLIAMS, on the 5th of *August*, A. D. 1851. The indictment contained three counts:—

1st Count. The jurors for our Lady the Queen upon their oath present that before the day of the taking of this inquisition to wit on the first day of *January* in the thirteenth year of the reign of her present Majesty and long before there was and from thence hitherto hath been and still is a certain common Queen's highway in the said county used for all the subjects of our said Lady the Queen to go return pass repass ride and labour on foot and on horseback and with cattle carts and carriages at their will and pleasure and that a certain part of the said last-mentioned common Queen's highway situate lying and being in the township or district of *Waverton* otherwise called *Waverton High and Low* in the parish of *Wigton* in *the county aforesaid called the *Yeveas Highway* leading from and out of the high-
[*341
 way from the village of *Waverton* towards the town of

Mary-port in the county aforesaid at or near a place called *Parkside* on the last mentioned highway and extending from thence towards and unto the highway leading from *Lesson Hall* towards the town of *Ireby* in the county aforesaid at or near *Waterside* in the township or district of *Waverton* aforesaid and containing in length 1350 yards or thereabouts and in breadth four yards or thereabouts on the day and year aforesaid and from thence continually hitherto until the day of the taking of this inquisition at the parish and in the township or district last aforesaid in the county aforesaid was and is yet very ruinous miry deep broken and in great decay for want of due reparation and amendment of the same so that the liege subjects of our said Lady the Queen during the time last aforesaid could not go return pass repass ride and labour with their horses cattle carts and other carriages in through and along the Queen's common highway aforesaid as they ought and were wont and accustomed to do without great danger of their lives and the loss of their goods to the great damage and common nuisance of all her Majesty's liege subjects going returning passing repassing riding labouring in through and along the Queen's common highway aforesaid.

And that the inhabitants of the said township or district of *Waverton* in the said parish of *Wigton* in the county aforesaid have from time whereof the memory of man is not to the contrary hitherto been used and accustomed to repair and amend and of right ought to have repaired and amended and still of right ought to repair *342] and amend that part of the highway aforesaid so as aforesaid being ruinous miry *broken and in decay when so often as there should be occasion.

And that the said inhabitants of the said township aforesaid have not yet done the same to the evil example

of all others in like case offending and against the peace of our Lady the Queen her Crown and dignity.

2d Count. That within the parish of *Wigton* aforesaid in the county aforesaid from time whereof the memory of man is not to the contrary there have been and still are divers townships or districts whereof the township or district of *Waverton* otherwise called *Waverton High* and *Low* during all the time last aforesaid hath been and still is one and that the inhabitants of the said township or district of *Waverton* in the parish aforesaid from time whereof the memory of man is not to the contrary have repaired and amended and have been used and accustomed to repair and amend and of right ought to have repaired and amended and still of right ought to repair and amend when and so often as it hath been or shall be necessary such and so many of the common highways situate and being within the township or district of *Waverton* aforesaid as would otherwise be repairable and amendable by the inhabitants of the said parish at large and *that the said part of the same common highway hereinbefore mentioned to be ruinous deep miry broken and in decay as aforesaid was a common highway which but for the said prescription or usage would be repairable and amendable by the inhabitants of the said parish of Wigton at large.* And that by reason of the premises the inhabitants of the township or district of *Waverton* aforesaid in the parish aforesaid during all the time last aforesaid ought to have repaired and amended and still ought to repair and amend the same part of the said common highway *so being *ruinous deep miry broken and in decay as aforesaid* when and so often as it hath [*343 been and shall be necessary and that the said inhabitants of the said township aforesaid have not yet done the same to the evil example of all others in like case offending and against the peace of our said Lady the Queen her Crown and dignity.

3rd Count. The same as the second ; with the exception that it averred that the inhabitants of the *several and respective townships*, whereof *Waverton* was one, situate in the parish of *Wigton*, were liable to repair the said highway.

Plea. Not guilty.

The jury having found the defendants *not guilty* on the first count, and *guilty* on the second and third counts, a rule *nisi* was obtained in the Queen's Bench on the 4th of *November*, to arrest the judgment on the second and third counts, on the ground that these counts were bad, in not containing any sufficient allegation that the highway, the subject of the indictment, was situated within the township or district of *Waverton*, or that the road was out of repair.

On the 13th *November*, A. D. 1851, this case was argued before Lord CAMPBELL C. J., PATTESON J., COLERIDGE J., and WIGHTMAN J.

S. Temple and *Pickering*, for the Crown. *Knowles* Q. C., *Atherton* Q. C., and *Unthank*, for the defendants.

Temple. After verdict, the second and third counts are sufficient, even if the Court should hold that the first count cannot be referred to. The second count says, "that the said part of the same common highway hereinbefore mentioned to be ruinous, deep, miry, broken, and in decay as aforesaid, was a common highway, which, but *344] for the said prescription or usage, *would be repairable or amendable by the inhabitants of the said parish of *Wigton* at large." That, after verdict, is equivalent to a direct averment that the highway was ruinous and out of repair. (*Posterne v. Hanson*, 2 Wms. Saund. 60 c, and 61 m, note 9, 5th ed. ; *Rex v. Somerton*, 7 B. & C. 463 ; *Rex v. Boyall*, 2 Burr. 832.) By the Statute of Jeofails, after verdict the second and third counts are suf-

ficient. (1 *Wms. Saund.* 228) *Secondly*; the first count contains express averments that the highway was ruinous and although the jury have found a verdict for the defendants on the first count, yet it may be referred to for the purposes of description.

PATTESON J.—Is not each count a separate indictment?

Temple. Not for all purposes. Reference may be made in one count to a preceding one. (*Reg. v. Craddock*, 2 Den. C. C. 21). If the first count may be referred to, then the objections to the second and third count are cured; the words being, the said part of the same highway being ruinous and in decay "*as aforesaid.*" But these words may be rejected as surplusage, if the first count cannot be referred to. The defendants have been found guilty of not repairing the highway when necessary; it is impossible that the jury could have found that verdict without being satisfied that the road needed repair, and without evidence that the road was situate in the township of the defendants. In the case *Reg. v. Waters*, 1 Den. C. C. 356, a defective statement of an act of misfeasance was held to be supported by the verdict.

Knowles Q. C., for the Crown.

Every count of an indictment should charge the offence with certainty. Lord *Mansfield* (1 T. R. 63) *said [**345* "It is necessary in every crime that the indictment charge it with certainty and precision, alleging all the requisites which constitute the offence."

Lord CAMPBELL C. J.—Lord *Mansfield* was not there speaking of an indictment after verdict.

Knowles. There is no statement in the second or third count that the road is out of repair. All that is said is, that this is the part of the highway which has before been described as ruinous. The words "so being ruinous" are merely equivalent to saying "so stated to be ruinous."

Although reference may be made in one count to another for some purposes, a substantial part of a charge cannot be made out by reference to a preceding count. In *Reg. v. Waters*, 1 Den. C. C. 356, the words "the said infant female child" were held not to import from a preceding count a description of the child as being of tender age.

COLERIDGE J.—But here the words of reference are, "so being ruinous as aforesaid."

Knowles. These words only point out the portion of the road to which the prosecutor refers. It is necessary that there should be an averment that the road was out of repair at the time that the indictment was found by the grand jury. (*Poynt's case*, Cro. Jac. 214; *Johnson's case*, Cro. Jac. 609; *Rex v. Hazell*, 13 East, 139; *Reg. v. Martin*, 9 Car. & P. 215.) Again, there is no allegation that the road is situate in the township of *Waverton*. (*Rex v. Upton-upon-Severn*, 6 Car. & P. 133.)

LORD CAMPBELL C. J.—It is averred affirmatively to be so in the first count, and that averment is referred to in the second count.

Knowles. So large a reference cannot be made from one count to another.

Cur. adv. vult.

*346] *On the 21st November, the judgment of the Court was delivered by LORD CAMPBELL C. J.

The second and third counts of the indictment in this case are drawn very inartificially; but we think that after verdict they may be supported. The allegation to which our attention was directed, when the motion was first made for arresting the judgment, certainly does not sufficiently charge that the road was out of repair, *viz.*, "that the said part of the same common highway hereinbefore mentioned, to be ruinous, &c., as aforesaid, was a common highway," &c. This is only a description of the

highway and not an allegation, that it was actually out of repair. But there follows an allegation, that the inhabitants of the township "ought to repair and amend the same part of the said common highway, so being ruinous, &c., as aforesaid, when and so often as it hath been and shall be necessary, and that the said inhabitants of the said township, have not yet done the same." Here we have a clear and specific reference to the first count, which contains a formal allegation, that this part of the highway was out of repair. There are many authorities to shew that one count of an indictment may refer to another, and that under such circumstances the maxim applies, *verba relata inesse videntur*.

The objection that the second and third counts do not shew the part of the highway out of repair to be in the township, admits of a similar answer. The first count alleges, "that a certain part of the said highway situate, lying and being in the township of *Waverton, &c.*" (describing it, and stating its length and width), "was, and yet is ruinous," &c.; and the second and third counts allege, "that the said part of the same common highway hereinbefore mentioned, to be ruinous," &c., was a highway, which the inhabitants *were bound to repair. It has been determined that any qualities or ad- [*347] juncts averred to belong to any subject in one count of an indictment, if they are separate from it, shall not be supposed to be alleged as belonging to it in a subsequent count, which merely introduces it by reference as the same subject "before mentioned." But the local situation of the part of the highway described, must necessarily and invariably belong to it, and if once described as being in a particular township, when there is afterwards enough to identify it as being what is so described, a repetition of the allegation, that it is within the township, seems not to be strictly necessary. We must very

much regret the negligence in framing indictments, which causes such discussions; but, we are glad that in this case it has not led to a failure of justice. The rule for arresting the judgment must be discharged.

REGINA v. WILLIAM KEY.

Where a prisoner is indicted for felony, and there is a count in the indictment stating a previous conviction, he is first to be arraigned on the whole indictment;—afterwards he is to be given in charge to the jury on the subsequent felony only; and if they find a verdict of guilty on that charge, then they are to inquire respecting the previous conviction. And where the jury were sworn afresh to try the question of previous conviction, and the prisoner's Counsel then claimed the right of challenge: *Held*, that the prisoner had no right of challenge then, and that the jury were resworn unnecessarily.

THE prisoner in this case was indicted at the *Michaelmas* General Sessions for the county of *Leicester*, held at the castle of *Leicester*, on the 13th day of *October*, A. D. 1851, and from thence continued by adjournment to the following day, for having on the 23rd day of *September*, A. D. 1851, at *Sileby*, in the county of *Leicester*, stolen a coat of the value of fifteen shillings, the property of *348] *Thomas Ball*. In the same *indictment there was a second count charging the prisoner with receiving the same property, knowing it to have been stolen, and a third count charging the prisoner with a previous conviction for felony.

The prisoner having been arraigned, pleaded "Not guilty;" and having declined to challenge any of the jury, the jurors were sworn, and charged in the usual way to inquire whether the prisoner was guilty or not. The jury having returned a verdict of guilty on the first count, were then charged to inquire into the fact of the previous conviction, when it was contended by the Coun-

sel for the prisoner that the jury must be resworn to try the new matter, and the Counsel for the Crown, admitting that according to the practice adopted on the authority of PARKE B., the jury must be resworn. (a) The Deputy Chairman, before whom the case was tried, directed that the oath, according to the form hereunder written, which was drawn up in Court from the notes of a Counsel present, and stated to be the form prescribed by the *learned Baron before mentioned, should [*349 be administered to the jury.

On the officer of the Court proceeding to administer such oath, the Counsel for the prisoner claimed the right of challenge to the jury, on the ground that the prisoner, *when arraigned*, had been told by the Clerk of the Peace that if he would challenge the jurors, or any of them, he must do so as "they came to the book to be sworn, and before they were sworn, and he should be heard." That the jurors were then, for the purpose of trying the fact of the prisoner's previous conviction, "come to the book;" and, accordingly, on the name of the first man of the jury being called, the Counsel for the prisoner peremp-

(a) The circumstance above alluded to occurred before PARKE B., at the *Northampton Summer Assizes*, in *July 1851*, the Act for the better Prevention of Offences (14 & 15 *Vict. c. 19*) having received the royal assent on the 3rd of that month.

In the case to which the prisoner's Counsel at the sessions referred, when the jury were about to be charged to inquire respecting the previous conviction of the prisoner, a copy of the new statute was handed up to PARKE B., and it was at the same time represented to his Lordship that Lord Chief Justice JERVIS and ALDERSON B., had expressed their opinion that the new statute would render it necessary, when trying a question of a previous conviction, to reswear the jury.

To prevent any question, his Lordship then directed the jury to be sworn in the words above set out, and in the manner stated by the counsel for the prisoner *Key*, but no question as to challenge was raised upon that occasion.

PARKE B., on comparing the 9th sect. of 14 & 15 *Vict. c. 19*, with 6 & 7 *Wm. 4, c. 111*, was satisfied that the practice, as to charging the jury to inquire respecting the previous conviction of a prisoner, was unaltered, and concurred with the rest of the Judges in opinion that there was no right of challenge under such circumstances, and that it was unnecessary to swear the jury afresh.

torily challenged him. The Counsel for the prisoner further intimated his intention of challenging, in like manner, each man of the jury who had convicted the prisoner on the first count of the indictment.

The Deputy Chairman disallowed the claim to challenge the jury, on the ground that the prisoner had been *arraigned* on the three counts; that his *plea* had been taken to the whole indictment, and that his right of challenge should have been exercised in the first instance, and before the jury were sworn to make true deliverance between him and our Sovereign Lady the Queen.

The jury were then sworn as follows:—"You shall well and truly try whether the prisoner has been before convicted of felony, in manner and form as in the indictment is alleged." And the prisoner was given in charge to the jury on the third count of the indictment, charging a previous conviction. He was found guilty, and sentenced to transportation for seven years; but, at the instance of the prisoner's Counsel, the Court reserved the following question for the decision of the Judges, *viz.*: Whether, *350] under the circumstances *detailed in this case, the challenge made on behalf of the prisoner should have been allowed? Execution of the judgment was respite until the above question should have been considered and decided, the prisoner being committed to prison.

On the 22nd of November this case was considered (a) by the Judges, when Lord CAMPBELL C. J. gave the following judgment:—

The prisoner was tried upon an indictment for larceny, which also contained a count alleging that there had been a former conviction for felony against him. He was arraigned in the usual, and, as we think, in the proper

(a) No Counsel appeared on either side.

manner, on the whole indictment. He pleaded not guilty to the whole. The jury were charged with that part only which charged a larceny, and the jury found him guilty of the larceny. It was then suggested to the Chairman by the learned Counsel for the prisoner, that it was the practice of PARKE B., when the jury after their verdict on the charge of larceny were to try the question of a previous conviction, to swear the jury afresh. I can only say, that I have had the unspeakable advantage of going two circuits with PARKE B., and that he adopted no such course. First, the prisoner is arraigned on the whole indictment; then the jury are charged to inquire respecting the felony only; and then, after their verdict on that charge, they are to inquire respecting the previous conviction. The learned Counsel intimated his intention to challenge all the jurors, and to have a fresh jury. But the Chairman was firm, and refused to allow the challenge, and the prisoner was convicted. The question reserved for our consideration is, was the prisoner entitled to a fresh challenge? and we are of opinion that there is no *pretence for saying that [351 he was; and I cannot help regretting to find such an attempt made at Quarter Sessions to interrupt the due administration of justice. (a)

REGINA v. GEORGE SHUTTLEWORTH.

14 & 15 Vict. c. 19, s. 9, makes no alteration in the mode of arraigning prisoners, and it is the opinion of all the Judges that it is unnecessary for the jury to be re-sworn when trying the question of previous conviction.

At the Sessions for the borough of *Manchester* holden

(a) The other Judges present were—ALDERSON B., PLATT B., TALFOURD J., and MARTIN B.

on the 4th of *August* A. D. 1851, before *Robert Baynes Armstrong, Esq., Q. C.*, Recorder of the said borough, *George Shuttleworth* was arraigned on an indictment charging him with larceny, and also with having been previously convicted of felony, and according to the invariable practice in that Court, before that time, both counts were read to the prisoner, and he pleaded not guilty *to the whole indictment*. At the trial, the count for larceny only was read by the clerk of the peace to the jury, and the witnesses in support of that charge were heard, and the jury found the prisoner guilty. The clerk of the peace then proceeded to read to the jury the further charge, that the prisoner had been previously convicted of felony, when the Counsel for the prisoner objected that that charge could not be gone into; and he further stated that it was his intention, however the court might decide that question, to move in arrest of judgment generally. The Court decided that the trial should go on, and the certificate of conviction having been put in, and the identity of the prisoner proved, the jury found that the prisoner had been previously convicted of felony. The learned Counsel for the prisoner then moved in
 *352] arrest of judgment, *contending that the plea of the prisoner, having been taken contrary to the provisions of the late act 14 & 15 *Vict. c. 19, s. 9, (a)*

(a) 14 & 15 *Vict. c. 19 s. 9*:—"And whereas provision is made in a certain act of Parliament passed in the twelfth year of the reign of her present Majesty Queen *Victoria*, intituled 'An Act to amend the laws in England and Ireland relative to Larceny and other offences connected therewith,' and also in this act, for the more exemplary punishment of persons who shall commit certain offences after one or more previous conviction or convictions for the like or other offences, and it is expedient to define the time of charging the jury to inquire as to such previous conviction or convictions: Be it enacted, that it shall not be lawful on the trial of any person for any subsequent offence, where a plea of not guilty shall have been entered on his behalf, to charge the jury to inquire concerning any previous conviction until they shall have inquired concerning such subsequent offence, and shall have found such person guilty of the same; and when-

was void, and that all the subsequent proceedings were a nullity, and that no judgment could be given on a verdict so found. The Court overruled the objection, and sentenced the prisoner to be transported for seven years. The execution of the judgment was respited, and the convict was kept in prison. The question for the Court of Criminal Appeal, is whether that sentence, under the circumstances stated, was legal, or whether any judgment could be passed on the verdict so given.

On the 22nd of *November, Milward*, for the Crown, no Counsel appearing for the prisoner, was stopped by Lord CAMPBELL, C. J., who said that the matter admitted of no doubt. The prisoner, added his Lordship, is first to be arraigned on the whole indictment, including the count on the previous conviction: afterward he is to be given in charge to the jury on the crime for which he is indicted only, and the count charging a previous conviction is not to be stated to the jury till they have given their verdict on the subsequent *felony.(a) It is also the opinion of all the Judges, that it is unnecessary for [* 353 the jury to be sworn again when trying the question of previous conviction.

ALDERSON B.—That has the full concurrence of all the Judges. The practice is precisely as it was before.

PLATT B., TALFOURD J., and MARTIN B., concurred.

REGINA v. MICHAEL PRESTON.

Where a bank note is lost, and is found by a person who appropriates it to his

ever in any indictment any previous conviction shall be stated the reading of such statement shall be deferred until after such finding as aforesaid."

(a) See *Reg. v. Key*, *supra*, p. 347, and also the observations of Lord CAMPBELL C. J., and ALDERSON B., in the case of *Reg. v. Shrimpton*, *supra*, p. 332.

own use: *Held*, that the jury are not to be directed to consider at what time the prisoner, after taking it into his possession, resolved to appropriate it to his own use, but whether at the time he took possession of it he knew, or had the means of knowing, who the owner was, and took possession of it with intent to steal it; for if his original possession of it was an innocent one, no subsequent change of his mind, or resolution to appropriate it to his own use, would amount to larceny.

THE prisoner, *Michael Preston*, was tried before *M. D. Hill*, Esq., Recorder of *Birmingham*, at the last Michaelmas Sessions for that borough, upon an indictment which charged him in the first count with stealing; and, in the second, with feloniously receiving a 50*l.* note of the *Bank of England*.

It was proved that the prosecutor, *Mr. Collis*, of *Birmingham*, received the note in question with others on *Saturday*, the 18th of *October*, from *Mr. Lidsam*, who, before he handed it to the prosecutor, wrote on the back of it the words "*Mr. Collis*." It was further proved that *Collis* was a very unusual surname in *Birmingham*, and almost, if not quite, confined to the family of the prosecutor, the well known master manufacturer.

About four o'clock the same afternoon the prosecutor accidentally dropped the notes in one of the *³⁵⁴public streets in *Birmingham*, and immediately gave information of his loss to the police, and also caused hand bills, offering a reward for their recovery, to be printed and circulated about the town.

On *Monday*, the 20th, about three o'clock in the afternoon, the prisoner, who had been living in *Birmingham* fourteen years, and keeping a shop there, went to one of the police stations, and inquired of a policeman if there was not a reward publicly offered for some notes that had been lost, and whether their numbers were known, stating that he was as likely as any person to have them offered to him, and if he heard anything of them he would let the police know. He also inquired if the

policeman could give him a description of the person who was supposed to have found them, and the policeman gave him a written description of such person, who was described therein as a tall man. Afterwards, between three and four o'clock the same afternoon, the prisoner went to the shop of Mr. *Bickley*, in *Birmingham*, and after inquiring if he (*Bickley*) had heard of the loss of a 50*l.* note, stated that he, the prisoner, thought he knew parties who had found one, and then asked *Bickley* whether the finders would be justified in appropriating it to their own use; to which *Bickley* replied that they would not.

At four o'clock on the same afternoon the prisoner changed the note, and was later in the same evening found in possession of a considerable quantity of gold, with regard to which he gave several false and inconsistent accounts.

He was then taken into custody, and on the following day (*October 21*), stated to a constable that when he was alone in his house on *Sunday*, a tall man whom he did not know, came in and offered him a 50*l.* note, for which he (the prisoner) gave him fifty sovereigns.

*The police officers had previously told the prisoner, that they were in possession of informa- [*355
tion that one *Tay*, who was known to the prisoner, had found the note; but *Tay* was not called, nor was any evidence given as to the part (if any) which he took in the transaction.

Upon these facts, the learned Recorder directed the jury, that the important question for them to consider, was at what time the prisoner first resolved to appropriate the note to his own use; if they arrived at the conclusion, that the prisoner either knew the owner, or reasonably believed that the owner could be found at the time, when he first resolved to appropriate it to his own

use, that is, to exercise complete dominion over it, then he was guilty of larceny; if on the other hand, he had formed the resolution of appropriating it to his own use, before he knew the owner, or had a reasonable belief that the owner could be found, then he was not guilty of larceny. He also told the jury that there was no evidence of any other person having possession of the note after it was lost, except the prisoner; but that even though the prisoner might not be the original finder, still if he were the first person who acted dishonestly with regard to it, and if he began to act dishonestly by forming the resolution to keep it for his own use, after he knew the owner, or reasonably believed that the owner could be found, he would be guilty of larceny.

The jury found the prisoner guilty upon the first count and the learned Recorder requested the opinion of the Judges as to the validity of the conviction. The prisoner was discharged on the recognizance of himself and sureties, to appear and receive judgment at the next Sessions.

On the 22nd November, A. D. 1851, this case was
*argued before Lord CAMPBELL C. J., ALDERSON
*356] B., PLATT B., TALFOURD J., and MARTIN B.

Bittlestone, for the Crown. *O'Brien* for the prisoner.

O'Brien. The jury found the verdict under the direction of the learned Recorder, and I submit that that direction was wrong in law. The jury were told, that the important question for them to consider, was *at what time* the prisoner first resolved to appropriate the note to his own use. If they arrived at the conclusion, that the prisoner either knew the owner, or reasonably believed that the owner could be found *at the time when he first resolved to appropriate it to his own use*, then he was guilty of larceny. But the real question is, whether the priso-

ner knew who the owner was, or had reasonable means of knowing who was the owner at the time of his taking the property into his possession? Unless at the time of taking it, there was a knowledge or a reasonable means of knowing who was the owner and the *animus furandi*, on the part of the finder, there could be no larceny. This is distinctly laid down in the judgment of PARKE B., in *Reg. v. Thurborn*, 1 Den. C. C. 387. In the case of *Merry v. Green*, 7 Mee. & W., which was an action for false imprisonment, the question was much discussed, and the difficulty was to find the precise time when the taking became a trespass. The conditions are laid down, in *Reg. v. Thurborn*, with great precision. In that case it was found, that when the prisoner picked up the note, he had the *animus furandi*, but had not the means of knowing who was the owner; and it was there held, that unless at the time of taking, the finder had an *animus furandi*, and the knowledge or the means of knowing who the owner was, he was not guilty of larceny. In the present case, it is not found by the jury, that the *prisoner when he picked up the notes, knew who the owner was [*357 or that he intended to steal them. It may well be that he had originally taken them innocently and “dispunishably.”

ALDERSON B.—The Recorder told the jury that even if the prisoner were not the original finder, still if he were the first person who acted dishonestly with regard to the note, he would be guilty of larceny.

O'Brien. There was ample evidence to shew that he was not the original finder.

Lord CAMPBELL C. J.—The first part of the Recorder's direction is consistent with this, that the prisoner may have received the property honestly, and have kept it for some time for the right owner, and afterwards have yielded to temptation, and appropriated it to himself.

ALDERSON B.—When the finder first takes it into his possession,—in order to constitute larceny,—there must be an intention of “*taking*” it the moment he knows what it is.

PLATT B.—There must, at that moment, be a *felonious taking*.

Lord CAMPBELL C. J.—If the original possession was a lawful possession, then there was no *asportavit*. If the prisoner, when he took the notes originally into his possession, had not the means of knowing who the owner was, and had not then the *animus furandi*, when was the “taking?”

O'Brien cited *R. v. Leigh*, 2 East P. C. 694; *R. v. Mucklow*, 1 Mo. C. C. 160.

Bittlestone, for the Crown.

The direction of the Recorder is supported by the judgment of the Court in *Reg. v. Thurborn*.

Lord CAMPBELL C. J.—Do you contend that if the prisoner once had the property honestly in his possession, *358] *he would be guilty of larceny by afterwards appropriating it to his own use?

Bittlestone. The question cannot be governed by the intention of the finder at the very moment he takes the thing into his possession. There must be time to examine it.

Lord CAMPBELL C. J.—Assume that he has full time for examination, and has examined it. The Recorder tells the jury to consider at what time the prisoner first resolved to appropriate it to his own use, and that if, when he resolved to appropriate to himself he had the means of knowing who the owner was, he was guilty of larceny, although he may have before then received it *bono animo*. When was the taking?

ALDERSON B.—The direction of the Recorder does not exclude the supposition that the prisoner might have got

the notes honestly, kept them for three or four days, and then resolved to appropriate them to his own use.

Bittlestone. I should submit that as long as the prisoner's possession of the property was an innocent one, his possession was that of the true owner. If a person find a bank note marked, so that it may be traced to the owner, the possession of the finder is the possession of the owner, so long as the finder deals honestly with the property. But as soon as the finder resolves to convert it to his own use he alters the possession, and then can only be said, for the first time, to take the note for the purpose of exercising dominion over it.

ALDERSON B.—There is no proof here that the prisoner could read any marks which may have been on the note.

Bittlestone. But there is evidence that he took them and shewed them to other persons who could read. He *went about making inquiries whether he could [*359 safely keep them for himself or not.

Lord CAMPBELL C. J.—That might have been strong evidence for the jury that the prisoner originally took the property *animo furandi*, and with the means of knowing who the owner was.

Bittlestone. PARKE B., lays it down in *Reg. v. Thurborn*, that the mere taking up of a note to look at is not a taking possession of the chattle. The taking is when the finder takes it intending to exercise complete dominion over it.

Lord CAMPBELL C. J.—Your position is that the finder, while he holds the property honestly, holds it for the right owner, and that when he resolves to appropriate it to his own use there is a new taking, and that he then takes it *animo furandi*?

Bittlestone. It is laid down in *Blackstone's Commenta-*

ries, (a) that although the finder of a chattel has a good title to it against all the rest of the world, he has no property or right of possession in a chattel which has been lost, adverse to the owner. The finder has a mere custody of it for the owner; and when he resolves to appropriate it *animo furandi* adversely to the owner, it is submitted that it is larceny.

MARTIN B.—Suppose a man takes an article,—an umbrella for instance,—by mistake, and three or four days afterwards discovers who the owner is, by the name which is upon it, and yet resolves to keep it as his own property, would that be larceny.

BITTLESTONE. I should say so; but this is the case of a fifty pound note. In *Wynn's case*, 1 Leach C. C. 413, it was held, that if a hackney coachman convert to his own use a parcel left by a passenger in his coach by mistake, *360] it is felony if he know the owner, or if he *took him up or set him down at any particular place where he might have inquired for him.

ALDERSON B.—This differs from a case of bailment, where the tortious breaking bulk determines the bailment. According to the direction of the Recorder, the notes might have passed through a dozen innocent hands before they came to the prisoner, who may have got them innocently, and yet the prisoner, he rules, was guilty of larceny.

LORD CAMPBELL C. J.—I am of opinion that this conviction cannot be supported. Larceny necessarily supposes a taking *animo furandi*. The rule, as to taking is somewhat technical, but it is not likely to be departed from. In the case before us the direction to the jury is consistent with an honest possession on the part of the prisoner. The Recorder says that the question for them to consider was, *at what time* the prisoner

(a) 1 Bl. Com. ed. Chitty, 296; *Armory v. Delomerie*, *Strange*, 505.

first resolved to appropriate the note to his own use. When, then, was the taking? It is supposed to be a thought which passed through the prisoner's own mind; but I do not think that can amount to a taking, when nothing was in fact done, and when, it may be, that the prisoner was lying in bed at a distance from the article. There is no taking *animo furandi* in this case; consequently, there is no larceny. It is unnecessary for us now to enter further into the question, after the elaborate judgment of my Brother PARKE, on the subject of larceny, in *Reg. v. Thurborn*.

ALDERSON B.—If there must be both a taking and the *animus furandi* to constitute larceny, the difficulty is, how the changing a man's mind, *ex post facto*, can render an honest taking larceny. According to the summing up of the Recorder to the jury, if a man gets a note honestly, keeps it for a week, with an intention of restoring it to the owner, and then changes *his mind and re- [*361 solves to appropriate it to his own use, it may be, as the Lord Chief Justice remarks, while he is in bed, that converts a lawful taking into a dishonest one. To uphold such a doctrine would be to refine in such a way as to destroy the simplicity of the criminal law.

TALFOURD J.—A mere movement of the mind cannot amount in law to a taking.

PLATT B.—The case where there has been a bailment stands on a different principle—that of breaking bulk, but to constitute larceny, in every other case, something must be *taken, animo furandi, and invito domino*.

MARTIN B.—It is of great importance that the rules of the criminal law should be plain and intelligible; and considering that the prisoner may originally have become innocently possessed of the note, I do not think that this can be held to be a case of larceny.

REGINA *v.* WILLIAM CHEAFOR.

The prisoner was indicted for stealing four tame pigeons, the property of *J. M.*: *Held*, that he was properly convicted of larceny; tame, i. e. reclaimed pigeons, although unconfined, with free access, at their pleasure to the open air, being as much the subjects of larceny as domestic fowl, which are allowed to go at large.

At the Quarter Sessions for the county of *Nottingham*, held at *East Retford*, on the 7th day of *July*, A. D. 1851, *William Cheafor*, was indicted for feloniously stealing four tame pigeons, the property of *John Mansell*. The pigeons, at the time they were taken by the prisoner, were in the prosecutor's dovecote, over a stable, on his premises, being an ordinary dovecote, and having holes at the top for the ingress and egress of the pigeons, and having a door in the floor which was kept locked. The prisoner *entered the dovecote at twelve o'clock *362] at night, breaking open the door and taking away the pigeons. The prisoner's Counsel contended, that the pigeons being at liberty at any time to go in and out of the dovecote, and therefore not reclaimed, and in a state of confinement, were not the subject of larceny. The Chairman directed the jury, that in his opinion the view contended for by the prisoner's Counsel was correct, and that the pigeons were not properly the subject of larceny. The jury found the prisoner guilty; but judgment was postponed, in order to ask the opinion of the Judges, as to whether the Chairman's direction to the jury was right, and whether the prisoner, under the facts stated, was properly convicted.

On the 22d day of *November*, A. D. 1851, this case was considered by the Judges, when the following judgment was pronounced by Lord CAMPBELL C. J.:(a)—In the in-

(a) The other Judges present were, ALDERSON B., PLATT B., TALFOURD J., and MARTIN B.

dictment, the pigeons are alleged to be tame, (a) that is reclaimed, and I think the jury have taken the correct view of the law. We think that the direction of the Court was wrong; because it really comes to this, can larceny be committed of tame pigeons? Pigeons must have the means of ingress and egress to the open air, and if the direction of the Chairman be law, no larceny could be committed of chickens, ducks and geese, which are all allowed to go at large. Mr. *Greaves*, in his note on *Luke's case*, 2 *Russell on Crimes*, 83, says, that that case was determined on the ground that the pigeons were tame and reclaimed, and not that they were shut up in boxes at the time they were taken. It had been supposed that PARKE B., had in a former case, (b) decided

(a) See 3 *Inst.* 118.

(b) The Editor has been favoured by Mr. Baron PARKE with the following notes of the case alluded to, but not cited by name, in 2 *Russell on Crimes*, p. 83, copied from his Lordship's ms. notes of the trial:—

“*Rex v. Samuel Howell: Bedford, July 23d, 1830.*

28th August, Stealing 370 Tame Douch Pigeons of John Hall, the elder.

John Hall, jun. Father is a farmer at Eaton, in this county. I manage the farm. I recollect discovering the lock of dovecote door was broken open with some instrument. I missed pigeons. I could see only four or five. There were six or seven dozen the day before. I saw that the lock was perfect the day before. Friday morning, about the end of August, I think the 27th, I discovered that there had been taken about eight. I saw the prisoner at eleven with Thomas Browning. Both were much intoxicated. I drove off in a gig, and overtook the wagon at Woolman Green. I saw the prisoner against the inn at Eaton, three quarters of a mile from the dovecote. I searched the wagon, and found six dozen pigeons in a pen. Wagoner gave them to me. Sent them in the pen to Eaton. I saw three or four pigeons at the dove-house next day. Woolman Green is thirty miles from Eaton. When I got home I found 130 pigeons dead. When I returned from Woolman Green I only saw the same number of pigeons that I had left.

William Swales. I drove the St. Neot's and London wagon on August 28th. Friday morning prisoner came to me at a place about half a mile from Eaton with Browning. I was driving the wagon to Baldock. They brought some pigeons in sacks, each to one sack. They were brought to go to London. I got a pad, and they put them in. This was about seven in the morning. They went with me about a mile. Hall met me in the afternoon near Woolman Green. I had only one basket of pigeons to my knowledge; the wagon was loaded with meat.

*363] that there could be no larceny of *pigeons, unless they were shut up in a house or box; but PARKE B., had, in fact, not so decided. We all think that the tame pigeons may be the subject of larceny, although they have an opportunity of getting out and enjoying themselves in the open air.

Cross-Examined by the Prisoner. I have been in prison a month to-day, under a charge of having received these, knowing them to have been stolen, and come from the gaol.

Charles Leitch. I am guard of the *Rocket* coach, from *Woolman Green* to *Eaton*. I recollect taking a hamper of pigeons in harvest time, from *Woolman Green* to *Eaton*. I cannot say who delivered; never received any other. They were brought to *Eaton* and left at *Mr. Fox's*. I delivered it in the same state as when I received.

Charles James Fox. I keep the *White Horse* at *Eaton*. I recollect a pad arriving by the *Rocket* on *Friday* night. Same day I heard of *Hall's* dovecote being broken open. *Gilby* and I handed them off, and took charge of them.

McGilby, hostler at *Eaton Fox's*. A pad came by the *Rocket*. I took them in to *Horley*. I locked them up, and gave them to *William Peck* in the morning.

* *William Peck.* I was living with *Mr. Hall* in *August* last. I was sent *364] to *Fox's* on a *Saturday* morning, and I got a pad of pigeons from *Gilby*, who took them from the *Horley*, and I took them home to my master. I did not know *Howell*. I gave the pigeons to *John Hall*, the younger.

John Hall (the elder). I saw the dovecote on *Saturday* morning; the pad had been brought home before. I returned from *London*, several dead, and others much exhausted. I tied red ribbon round the necks of eleven, and turned them off half a mile from my dovecote. I went round about a quarter of an hour after, and saw three on the dovecote; the number in the pad, added to those which were left in the dovecote, amounted to about the number I had. I apprehended prisoner myself, in *London*, the 22d *June* last. Most of my pigeons were blue; most in the pad were blue.

John Emery. I was on the *Rocket* coach. *Hall*, the younger, stopped the coach, and put a pad of pigeons, to be taken home to *Eaton*. I was with the coach to *Eaton*, and left there. Guilty."

PARKE B., upon the foregoing facts, ruled that the prisoner was guilty of larceny, and it being the prisoner's third offence, his Lordship sentenced him to seven years' transportation.

Luke's case was subsequently decided, as stated in *Russ*. See *Roscoe's Criminal Ev.* 1850, p. 630.

[Doves, being animals, *feræ naturæ*, cannot be the subject of larceny unless when in the custody of the owner, as in a dove-house; *Commonwealth v. Chase*, 9 Pick. 15. A martin caught in a trap in the woods cannot be a subject of larceny while it remains in the trap. *Norton v. Ladd*, 5 New Hamps. 203. Bees in the possession of the owner are the subject of larceny. *The State v. Murphy*, 8 Blackford, 498.]

REGINA v. HENRY ROWLANDS, WILLIAM PEEL,
FREDERICK GREEN, THOMAS WINTERS, CHARLES
PIATT, GEORGE DUFFIELD, THOMAS WOODNORTH,
AND JOHN GAUNT.

In an indictment for a conspiracy at common law to effect objects prohibited by a statute, it is enough to follow the words of the act of Parliament.

Therefore an indictment which charged a conspiracy to force workmen to depart from their employment, to raise the rate of wages, &c., by "molesting," by "threats," by "intimidating," by "obstructing," &c., in violation of 6 Geo. 4, c. 129: *Held* good, without setting out the *means* employed to molest, intimidate, or obstruct, or the threats that were held out.

Three counts charged that the defendants conspired "unlawfully to intimidate, prejudice and oppress" the prosecutors in their trade and occupation, and "by divers subtle means and devices, and wicked arts and practices, to injure and oppress" the prosecutors; and also to "intimidate, prejudice, and oppress" the same, and "to entice away their workmen, and thereby to injure and oppress" the prosecutors; the Court, without pronouncing these counts bad, recommended that a *nolle prosequi* should be entered in respect of these three counts.

Note—*Rex v. Turner*, 13 East, 228, and *Rex v. Pywell*, 1 Stark. 402, are overruled.

THE prisoners were tried before Mr. Justice ERLE and a special jury, at the *Staffordshire* Summer *As-sizes, on *Tuesday, July 29th*, A. D. 1851, on an [*365 indictment for a conspiracy by molesting workmen to compel them to quit their employment, to increase the rate of wages, &c.; removed into the Queen's Bench by *certiorari*, and sent down by that Court for trial before his Lordship, at *Stafford*. The indictment contained twenty counts.

The first count was in the following words:—

1st Count. The jurors for our Lady the Queen upon their oath present that heretofore before and at the time of the committing of the offence hereinafter in this count mentioned *Richard Perry* and *George Henry Perry* carried on trade and business as manufacturers of japanned and tin wares at *Wolverhampton* in the said county of *Stafford*

under the name firm and style of *Richard Perry and Son*, and that divers to wit fifty persons were workmen and were hired and employed by and worked as workmen for the said *Richard Perry* and *George Henry Perry* in their said trade and business, and the jurors aforesaid upon their oath aforesaid do further present that *Henry Rowlands* late of the parish of *Wolverhampton* in the said county of *Stafford* labourer *William Peel* late of the same place labourer *Frederick Green* late of the same place labourer *Thomas Winters* late of the same place labourer *Thomas Pitt*(a) late of the same place labourer *Charles Piatt* late of the same place labourer *George Duffield* late of the same place labourer *Thomas Woodnorth* late of the same place labourer and *John Gaunt* late of the same place labourer with divers other evil disposed persons on the seventh day of *October* in the year of our Lord one thousand eight hundred and fifty with force and arms at the parish aforesaid in the county aforesaid did amongst *themselves unlawfully conspire combine confederate and agree together by *unlawfully molesting the said workmen so hired and employed by and working for the said Richard Perry and the said George Henry Perry in their said trade and business as aforesaid* to force and endeavour to force the said workmen so hired and employed by and working for the said *Richard Perry* and *George Henry Perry* as aforesaid in their said trade and business as aforesaid to depart from their said hiring employment and work to the great damage of the said *Richard Perry* and *George Henry Perry* to the evil example of all others in the like case offending and against the peace of our Lady the Queen her Crown and dignity.

2nd Count. This count was the same as the first, except that it did not allege that *Richard Perry* and *George*

(a) *Thomas Pitt* was acquitted by the jury.

Henry Perry carried on their business under the name firm and style of *Richard Perry and Co.*, and charged that the defendants had conspired “*by unlawfully using threats to the said workmen so hired and employed,*” &c. to force and to endeavour to force the said workmen so hired &c. to depart from their hiring.

3rd Count. The same as second, except that the defendants are charged with having conspired by “*unlawfully intimidating*” the said workmen to force them to depart from their hiring.

4th Count. This Court, after averring that one *Joseph Evans* and *William Hodson* were workmen, and were hired and employed by, and worked as workmen for the said *Richard Perry* and *George Henry Perry*, charged that the defendants conspired *by unlawfully molesting the said Joseph Evans and William Hodson* to force them to depart &c.

5th Count. In the same terms averred that *Hodson* was a workman in the employment of the *prosecutor, and that the defendants by *unlawfully* [*367 using *threats* to the said *Hodson* to force him to depart from his said hiring.

6th Count. Averred that *Thomas Griffiths* was a workman of prosecutors, and that the defendants conspired *by intimidating* him to force him to depart &c.

7th Count. After inducement as in the second count, charged the defendants with having conspired “*by unlawfully molesting the said Richard Perry and George Henry Perry,* to force and endeavour to force the said workman so hired and employed and working for the said *Richard Perry* and *George Henry Perry* as aforesaid in their said trade and business as aforesaid to depart from their said hiring,” &c.

8th Count. The same, except charging that defendants conspired by *obstructing the prosecutors and their work-*

men to force the said workmen, &c. hired, &c. to depart, &c.

9th Count. And the jurors aforesaid upon their oath aforesaid do further present that heretofore before and at the time of the committing of the offence in this count mentioned *Richard Perry* and *George Henry Perry* carried on trade and business as manufacturers of Japanned and tin wares at *Wolverhampton* aforesaid in the county aforesaid and the jurors aforesaid upon their oath aforesaid do further present that the said *Henry Rowlands* the said &c., (naming the before mentioned defendants) with divers other evil disposed persons at the parish &c. with force and arms on the day &c. did unlawfully conspire combine confederate and agree together *by molesting the said Richard Perry and George Henry Perry to force and endeavour to force the said Richard Perry and George Henry Perry so carrying on their trade and business as aforesaid to make* *368] *an alteration in *the mode of conducting and carrying on their trade and business as aforesaid to the great damage of the said Richard Perry and George Henry Perry to the evil example of all other in the like case of offending and against the peace of our Lady the Queen her Crown and dignity.*

10th Count. After inducement same as in second count charged the defendants conspired *by obstructing the said Richard Perry and George Henry Perry by inducing and persuading the said workmen in the hiring and employment of the prosecutors to leave their hiring to force and endeavour to force the said Richard Perry and George Henry Perry to make an alteration in the mode of conducting and carrying on their trade and business.*

11th Count. Averred that divers workmen were being hired and employed by Messrs. *Perry* and charged that the defendants conspired *by molesting and obstructing such workmen as aforesaid as might be willing to be hired and*

employed by the said Richard Perry and George Henry Perry in their said trade and business as aforesaid and who were not then hired and employed by the said Richard Perry and George Henry Perry or by any other person to prevent and endeavour to prevent the said workmen so willing to be employed by the said Richard Perry and George Henry Perry in the said trade and business as aforesaid from hiring themselves to and from accepting work and employment from the said Richard Perry and George Henry Perry &c.

12th Count. The same except the allegation that the defendant conspired by *unlawfully using threats and intimidation.*

13th Count. That heretofore &c. and that divers to wit fifty persons being artificers had contracted with the said *Richard Perry and George Henry *Perry* to serve them as workmen and artificers in their [*369 said trade and business for certain times and periods respectively agreed upon between them and the said *Richard Perry and George Henry Perry* and that the said persons so being such artificers as aforesaid had entered into the service of the said *Richard Perry and George Henry Perry* as such manufacturers as aforesaid and that the defendants conspired by *divers subtle means and devices to induce and persuade the said artificers so having contracted with the said Richard Perry and George Henry Perry as aforesaid and so having entered into the service of the said Richard Perry and George Henry Perry unlawfully to absent themselves from the said service of the said Richard Perry and George Henry Perry without the consent of the said Richard Perry and George Henry Perry or either of them before the respective terms of their said contracts as aforesaid were completed.*

14th Count. That *William Hodson* had contracted to serve the prosecutor for two years, that he had entered their service and that the defendants had conspired by

divers subtle means and devices and illegal acts and practices and by intoxicating the said William Hodson to induce and persuade him unlawfully to absent himself without consent before contract completed.

15th Count. Alleges that *Thomas Griffiths* contracted to serve the prosecutors for three years, had entered, and in the same words as the preceding count charges that the defendants by like means conspired to induce and persuade him to absent himself without consent before contract completed.

16th Count.(a) And the jurors aforesaid &c. that the *370] *said Henry Rowlands* (naming the other defendants) with divers other evil disposed persons on &c. with force and arms at &c. did unlawfully conspire combine confederate and agree together *unlawfully to intimidate prejudice and oppress one Richard Perry and one George Henry Perry* in their trade and occupation as manufacturers of japanned and tin wares and to prevent the workmen of the said *Richard Perry* and *George Henry Perry* from continuing to work for the said *Richard Perry* and *George Henry Perry* in their said trade and occupation to the great damage &c.

17th Count. And the jurors aforesaid &c. do further present that the said *Henry Rowlands* the said (naming the other defendants) with divers other evil disposed persons on &c. with force and arms at &c. did unlawfully conspire combine confederate and agree together by divers subtle means and devices and wicked acts and practices *to injure and oppress the said Richard Perry and George Henry Perry* in their trade business and occupation of manufacturers of tin and japanned wares and to *induc* the workmen of the said *Richard Perry* and *George Henry*

(a) As to the sufficiency of the sixteenth, seventeenth and nineteenth counts, see the observations of the Lord Chief Justice in delivering the judgment of the Court, *post*, p. 387.

Perry to depart from their employment and work with the said Richard Perry and George Henry Perry before the period of their agreement with the said Richard Perry and George Henry Perry was completed to the great damage &c.

18th Count. That the defendants conspired by divers &c. and by *intoxicating and thereby rendering senseless* the workmen of prosecutors to convey to a distance and carry away the said workmen and thereby prevent them from continuing to work for prosecutors and to *injure aggrieve and oppress* the prosecutors.

19th Count. That defendants conspired to *intimidate prejudice and oppress* the prosecutors and to *entice and *seduce away* their workmen and thereby to injure [*371 and oppress prosecutors &c.

20th Count. And the jurors aforesaid &c. do further present that the said *Henry Rowlands* the said &c. (*naming the other defendants*) with divers other evil disposed persons at &c. with force and arms on &c. unlawfully did conspire combine confederate and agree together by divers subtle means and devices and by illegal acts and practices and by molesting and rendering intoxicated the workmen in the employment of the said *Richard Perry* and *George Henry Perry* and by inducing the said workmen to depart from the said employment of the said *Richard Perry* and *George Henry Perry* and to break their contracts with the said *Richard Perry* and *George Henry Perry* to force and compel the said *Richard Perry* and *George Henry Perry* to alter and thereby increase the amount of wages which they the said *Richard Perry* and *George Henry Perry* then were in the habit of paying to workmen in the employment of them the said *Richard Perry* and *George Henry Perry* to the great damage of the said *Richard Perry* and *George Henry Perry* to the evil example of all others in like case offending and against

the peace of our Lady the Queen her Crown and dignity.(a)

The jury found all the defendants guilty upon all the counts, and a verdict(b) of guilty was entered on each of the counts.

*372] *On Friday, November 21st, A. D. 1851, the defendants being present in Court,(c) a motion in arrest of judgment was made in the Queen's Bench, before Lord CAMPBELL C. J., PATTESON J., COLERIDGE J., and ERLE J.

Allen Serjt., Huddlestons and Kettle, for the Crown.

(a) In all the counts the charges are laid to the great damage of the prosecutors and against the peace, &c.

(b) After the verdict was returned at the trial at *Stafford, Huddlestons*, for the Crown, asked the learned Judge who presided, whether his Lordship thought it was a proper case for a special jury? Mr. Justice ERLE said, "I think so. I said yesterday it was a very complicated case. I will endorse it on the record." His Lordship then certified, pursuant to 6 Geo. 4, c. 50, s. 34.

(c) As to the presence of prisoners in Court when a motion is made for a new trial, see the observations of Lord CAMPBELL C. J., *infra*.

Regina v. Caudwell, MICH. TERM, Q. B., 1851.

The defendant in this case was tried on an indictment for Perjury, before ERLE J., at the *Berkshire* Summer Assizes, and having been found guilty was sentenced to transportation for seven years. *Pigott* and *Huddlestons*, on the 6th of November, being about to move in the Queen's Bench for a new trial,

Lord CAMPBELL C. J., said, Is the defendant in custody?

Pigott. He is not.

Lord CAMPBELL C. J.—Is he present in Court?

Pigott. No.

Lord CAMPBELL C. J.—Then we cannot hear your application.

Pigott. Since 11 Geo. 4 & 1 Wm. 4, c. 70, it has not been decided to be necessary. In *Rex v. De Berenger and Others*, 3 M. & S. 67, a motion was made for arresting the judgment, although two of the defendants were not present to receive judgment. In this case no warrant has been issued for committing the defendant in execution.

Lord CAMPBELL C. J.—I have always considered it to be a hardship, where there are several defendants who have been found guilty on an indictment, not to allow one of them to move for a new trial, unless all the other defendants are present when the motion is made. But there can be no such hardship where there is but one defendant. In this case peculiarly the defendant ought to be in Court. Sentence has been passed, which he has hitherto evaded: and the Court will not permit him to make the experiment of obtaining a new trial without coming into Court to abide the consequences in case we should refuse the rule.

The Attorney General (Sir A. Cockburn), *Whateley* Q. C., *Keating* Q. C., *Peacock* Q. C., *Perry*, *Skinner*, *Vaughan*, *Macnamara*, and *Lawrence*, for the defendants.

The Attorney General, for the prisoner *Green*.

The prisoners were convicted on all the counts of the indictment, and it is submitted that they are bad in *point of law. They are chiefly framed on 6 Geo. 4, c. 129, and charge a conspiracy to do certain [*373 things prohibited by that statute. The general words of the act are used,—that the defendant conspired to force the workmen of Messrs. *Perry* to desert their employment, by means of molesting, obstructing, intimidating by threats, and by intoxicating. In a second class of counts, the same conspiracy is charged, but as applicable to workmen willing to be hired, and about to hire;—in others as applicable to workmen actually hired and within 4 Geo. 4, c. 34, s. 3. The ninth, tenth and twentieth counts are framed on another part of the 6 Geo. 4, c. 129, and charge that the prisoner, by molesting, obstructing, intimidating, &c., conspired to compel Messrs. *Perry* to make an alteration in their business, and in the rate of wages which they were in the habit of paying to their workmen. Here, again, the counts proceed upon the words of the act of Parliament—molesting, obstructing, by threats or intimidation; but it is submitted that they are all bad, as being too general. First, consider the indictment at common law. It would, undoubtedly, be bad at common law;—and if it be too general at common law, is the indictment helped by the statute? The third count charged that the prisoner and others did conspire, by “intimidating” the workmen of Messrs. *Perry* to force, and endeavour to force them to depart from hiring. The case of *O’Connell and Others v. The Queen*, 11 Cl. & Fin. 162, was an express authority to shew that such an averment was insufficient. The sixth count of

the indictment in that case is thus set out:—"That the said defendants, unlawfully, maliciously and seditiously contriving, intending and devising, by means of intimidation and demonstration of great physical force, to procure and effect changes to be made in the government, *laws and constitution of this realm, as by *374] law established; heretofore, to wit, on the 13th *February*, A. D. 1843, with force and arms, to wit; &c., aforesaid, unlawfully, maliciously and seditiously did combine, conspire, confederate and agree with each other, and with divers other persons whose names are to the jurors aforesaid unknown, to cause, procure, and aid and assist in causing and procuring divers subjects of our said Lady the Queen, to meet and assemble together in large numbers, at various times, and at different places within *Ireland*, for the unlawful and seditious purpose of obtaining, by means of intimidation to be there caused, and by means of the exhibition and demonstration of the great physical force at such assemblies and meetings, changes and alterations in the government, laws and constitution of this realm as by law established, in contempt, &c." It was objected by the plaintiffs in error, that this count was bad; and Lord Chief Justice *Tindal*, in giving judgment, expressed the following opinion as to the foregoing count, and the seventh count, which was nearly in the same words: "We all concur in opinion, that they do not state the illegal purpose and design of the agreement entered into between the defendants, with such proper and sufficient certainty as to lead to the conclusion that it was an agreement to do an act in violation of the law. Each of these two counts does, in substance, state the agreement of the defendants to have been to cause and procure divers subjects to meet together in large numbers, for the unlawful and seditious purpose of obtaining, by means of the intimidation to be thereby caused, and

by means of the exhibition and demonstration of the great physical force at such meetings, changes in the government, laws, and constitution of this realm. Now, though it may be inferred from this statement [*375 *that the object of the defendants was *probably* illegal, yet it does not appear to us to be so alleged with sufficient certainty. The word "intimidation" is not a technical word; it is not *vocabulum artis*, having a necessary meaning in a bad sense; it is a word in common use, and, in order to give it any force, it ought at least to appear from the context what species of fear was intended, or upon whom such fear was intended to operate." To allege that the prisoners conspired "by intimidating" is, therefore, not enough.

COLERIDGE J.—The judgment in the case of *O'Connell v. The Queen* also proceeded on the circumstance, that the indictment did not state who were to be intimidated.

The Attorney General. It is not necessarily to be assumed that "intimidation" is employed in a bad sense; the intimidation may have been by lawful means. With respect to the word "obstructing," which is employed in several counts of this indictment, in *Frost v. Lloyd*, 16 L. J., N. S., Q. B. 13; 9 Q. B. 130, it was held by this Court, that the word "obstruction" was insufficient, without stating specifically the nature of the obstruction. It was an action of replevin, and the avowry by the bailiff of a manor justifying the seizure as a distress for an amercement stated that the plaintiff had unlawfully *obstructed* the jurors of the manor in their examination of the weights and measures, and that the jury had presented that the plaintiff had so obstructed them, whereupon he was amerced, &c. It was held bad on special demurrer for not stating in what the obstruction consisted. *Peacock*, for the plaintiff, was stopped by the Court, and *Williams J.* said,—“Why is it not stated what

the obstruction was?" And Lord *Denman* observed, "I
*376] think this averment as to obstruction *insufficient.
The obstruction may be effected by deterring them
as well as by the use of material force, but it ought to
appear in what way it was effected." *Putteson J.* added,
"As it alleges an obstruction it ought so to allege it that
the Court can see that there was one." So also in the
case of *Reg. v. Peck and Others*, 9 Ad. & El. 686, an in-
dictment which charged that the defendants "falsely,
unlawfully and wickedly did conspire, confederate and
agree among themselves to deceive and defraud the cre-
ditors of the prisoners, was held bad, as being too gene-
ral, and as not stating with sufficient certainty the nature
of the conspiracy." In that case Lord *Denman*, in giving
judgment, said, "we think the counts are defective in
not stating with sufficient particularity what the defend-
ants conspired to do;" and the judgment was reversed
accordingly. These are authorities to shew that where
language is capable of a twofold conclusion the indict-
ment must shew specifically the particulars on which
the prosecutor relies. But it will be said that the indict-
ment in this case follows the words of the act of Parlia-
ment. There can be no doubt that as a general rule an
indictment which does so is good; but this rule is subject
to exceptions; *Paley on Convictions*, 100, *et seq.*; *Ib.* 124,
et seq., *Rex v. Neild and Others*, 6 East, 425; *Rex v. Ridg-
way*, 5 B. & Ald. 527. It is laid down in a case in *Cal-
decott*, 458, that where the Legislature in its language
comprehends divers offences under general terms it is not
enough to follow in a conviction the words of the statute,
but it is necessary to state what particular act prohibited,
has been committed. It is submitted, that this principle
applies here; and that where the statute uses general
words, which may be consistent with an innocent pur-
pose, it is not enough to employ the words of the act of

Parliament in an indictment *without shewing, by proper averments, what the offence is. In *Re Turner*, 9 Q. B. 80, which was a return to a *habeas corpus*, a conviction under 4 Geo. 4, c. 34—one of the statutes on which some of the counts in this indictment are framed—was held bad, though it followed the words of the statute; and, in giving judgment, *Williams J.*, said, I always thought that the law was properly laid down by Lord *Mansfield*, in *Rex v. Corden*; (a) that if the fact, as charged, may be consistent with the innocence of the prisoner, no offence is charged. It is said to be sufficient to follow the words of the statute; but many cases may be put in which a party may absent himself from service, within the general terms of the statute, consistently with innocence.”

Lord CAMPBELL C. J.—If it is laid down that where it is consistent with the allegations in the indictment, that no indictable offence has been committed, the indictment is insufficient, that is a useful rule.

The Attorney General. The facts must be stated on the face of the indictment, so that the Court can judge as to their sufficiency.

Whateley Q. C., for the prisoners *Rowland* and *Piatt*.

It must now be taken as the true rule, that it is not enough that it is probable, from the allegations in the indictment, that the prisoner has been guilty of an offence, but that the offence must be alleged to be a certainty. That is the rule laid down by *Tindal C. J.*, and, indeed it is no new rule,—it is not new law, but it is eminently reasonable. It was ruled by the same high authority that the word “intimidation” is not *vocabulum artis*, but that in an indictment it is necessary to shew what were the means that were employed in intimidating. The

(a) 4 Burr. 2279.

word molesting next occurs, and what is the meaning of "molesting?" *Johnson*, *in his Dictionary, describes "molestation" (*molestia*), "Disturbance—uneasiness caused by vexation;" and he gives two illustrations of it: the first from *Brown's Vulgar Errors*, "Though useless unto us, and rather of *molestation*, we refrain from killing swallows;" the second is from *Morris's Miscellany*, "An internal satisfaction and acquiescence, or dissatisfaction and *molestation* of spirit attend the practice of virtue and vice respectively." To charge, then, that the defendants conspired by molesting, without setting out the means, is not a legal mode of stating the offence. Another count charges that the defendants had conspired, by using "threats," but it does not say what threats. Is it a threat of not consorting with you? "I'll not keep company with you;" "I'll not join the club you belong to?" The nature of the threats ought to be shewn. Then there is the word "obstructing;" but all these words must be taken *mitiori sensu* and they do not necessarily mean anything illegal. One may obstruct the passage of an act of Parliament, or may obstruct the course a man is taking, and it is submitted that it is not enough to use the words of an act of Parliament, unless there are proper averments to bring the offence charged within the statute, or unless apt words of art are used. This is laid down in the elaborate judgment of Lord Denman, in *Chaney v. Paine*, 1 Q. B. 712. It is apprehended that it cannot be said that the word "unlawfully" can aid defective allegations in the indictment. (*Rex v. Seward and Others*, 1 Ad. & El. 706; 1 Stark. Crim. Pl. 79.) With respect to the eleventh and twelfth counts, the *scienter* is the gist of the offence. When it is charged that the defendants conspired to prevent people from entering into the service of the prosecutor, the facts should be stated. To the thirteenth, fourteenth and fifteenth

counts the same objections prevail. *The thirteenth count charges that the defendants had con- [*379
spired to induce and persuade artificers, who had contracted, to absent themselves without consent, &c. The fourteenth charges that they had conspired to induce *Hodson*, who had contracted, &c., by "intoxicating him," to absent himself. The fifteenth, the like as to *Griffiths*. But it is not stated in any of these counts that the prisoners *knew* that these parties had entered into these contracts; nor is it alleged that the men had entered into service under a contract in writing, which is necessary according to *Lindsay v. Leigh*, 11 Q. B. 455.

PATTESON J.—The indictment says, that they *had* contracted and entered.

Whateley. It does not set out the contract, nor allege that they had entered under a written contract, and no *scienter* is alleged. Again, it is not stated for what length of time the workmen had absented themselves. It may have been only for half an hour.

Lord CAMPBELL C. J.—In the case of a conspiracy to induce and persuade workmen to absent themselves from their employment, it is not necessary to allege that the workmen had absented themselves.

Whateley. In the case of *Regina v. Daniell*, 2 Anne, 6 Mod. 99, which was an indictment for persuading and causing an apprentice to leave his service, it was objected that there was no averment in the indictment of his leaving the service, and *per Curiam*, the indictment is ill for want of an express allegation of absenting; 9 Q. B. 80. The prisoners are indicted for having conspired to "persuade" the workmen of the prosecutor to leave his service. But there is no reason why one man may not persuade another, or why a number of workmen may not persuade a number of other workmen, by any lawful means or arguments, to leave one employment for another.

*380] *Lord CAMPBELL C. J.—Are not the words of the indictment, “by divers subtle means and devices” words of art?

Whateley. In the case of *Rex v. Biers and Another*, 1 Ad. & E. 327, it was held that the words by “false, artful and subtle stratagems and contrivances,” did not aid a defective indictment. In the case of *Rex v. Seward*, 1 Ad. & E. 706, it was held that “persuading” a pauper to marry another pauper, settled in and chargeable to another parish, was not a sufficient overt act in a case of conspiracy. The fourteenth and fifteenth counts charge that the defendants, by divers subtle means, and by “intoxicating,” had induced and persuaded the workmen to absent themselves. These averments are insensible and repugnant. It was the liquor, and not the prisoners, that intoxicated them. Some persons are intoxicated by joy, flattery, and in other ways. The word “intoxicating” is not a word of art, nor is it employed in the act of Parliament.

COLERIDGE J.—Would it be enough to say that they had made the men drunk?

Whately. That is not denied. The sixteenth count charges that the defendants conspired to intimidate, prejudice, and oppress the prosecutors, and to prevent their workmen from continuing to work for them. No particulars whatever are stated. The eighteenth count is open to the same objection as the fourteenth, respecting intoxicating. The nineteenth count charges that the prisoners conspired to entice away the workmen of the prosecutor. But is that an indictable offence?

Lord CAMPBELL C. J.—Would it not be indictable if it were done for the purpose of ruining a tradesman?

Whateley. That is a very different case; but suppose it were merely done out of rivalry, then, it is appre-

hended, it would not amount to an indictable *misdemeanor; 6 *Mod.* 99. The prisoners are [*381 greatly aggrieved by the number of counts in this indictment, and the multiplicity of the charges to which they have to answer.

Lord CAMPBELL C. J.—I deprecate most strongly the number of counts. I disapprove of the practice of multiplying counts in indictments, and I will use all my influence against it.

Whateley. The twentieth count is a kind of summary of all the others, and charges a conspiracy by subtle means, by rendering intoxicated, molesting, &c., to raise the rate of wages, &c.; but it is submitted, that it shews no indictable offence. The prisoners had a right to combine to compel their employers to raise the rate of wages. They had a right to say we will combine together for this book of wages, and we will not work until we get it.

Lord CAMPBELL C. J.—But they must not infringe the provisions of the third section of the act of Parliament.

Whateley. They had, it is contended, a right to combine to raise the rate of wages.

Lord CAMPBELL C. J.—They have a right to abstain from working for a particular employer if they are not satisfied with the rate of wages.

Whateley referred to *Reg. v. Richardson and Others*, 2 Moo. & Rob. 402.

Keating Q. C., for the prisoners *Woodnorth* and *Gaunt*.

The charges in all the counts are too general. The word “molesting” was most relied upon at the trial; but it does not necessarily import an indictable offence. The prisoners had a perfect right to induce, and by lawful means persuade the workmen of the prosecutor to leave his employment. The eleventh and twelfth counts should have stated the names of those workmen who were al-

*382] leged to be ready to enter into service; **Reg. v. King*, 4 Q. B. 782. 7 *Geo. 4*, c. 34, s. 3, enacts, that justices may issue warrants to apprehend servants in husbandry, artificers, &c., who, having entered into service under a contract, have absented themselves, and may commit the offenders to the House of Correction. It is submitted that the various counts of the indictment framed upon this statute, should have stated that the contracts of the workmen, there referred to, had been made subsequent to the passing of that act of Parliament, which, for the first time, made it penal for servants so to absent themselves from their employment; *Rex v. Biers and Others*, 1 Ad. & E. 327.

Peacock Q. C., for the prisoner *Duffield*.

It is very desirable that some rule should be laid down, so that the crime of conspiracy should be defined with certainty. In *O'Connell's case*, Lord Chief Justice *Tindal* said, "The crime of conspiracy is complete if two, or more than two, should agree to do an illegal thing; that is to effect something in itself unlawful, or to effect, by unlawful means, something which in itself may be indifferent, or even lawful."—A similar definition of the offence is given by *PARKE B.* Now, it is apprehended, that every indictment for conspiracy must shew either the one or the other,—either that the act which the parties are charged with having conspired to do was an illegal act, or if it were not in itself illegal, what were the means employed to commit it. If the conspiracy be to do some lawful act, then the unlawful means must be set out in the indictment with sufficient certainty. In *Rex v. Seward*, 1 Ad. & E. 706, Lord *Denman* said, "An indictment for conspiracy ought to shew, either that it was for an unlawful purpose, or to effect a lawful purpose by unlawful means." The indictment charges a conspiracy by "molesting;" but, though the word

molesting occurs in the statute, it is not enough, in every case, to follow the words of an act of Parliament; there should have been averments to bring it within the act. The word "intimidating" is open to the same remark. Suppose a man had said the business is going to ruin; that might operate in intimidating some persons, but it would not sustain a charge of conspiracy. It is submitted, that the prisoners could not have been convicted before the justices for the offence contemplated by the Legislature. The names of those who had been induced to absent themselves should have been set out. In *King v. The Queen*, 7 Q. B. 798, it is observed by PARKE B., "If there is a conspiracy to injure given persons, who are unknown to the jurors, it should be stated accordingly." Suppose the indictment had been for a conspiracy to induce one servant to quit his employment; ought not his name to have been mentioned? In some counts the names of some of the parties are specified. The thirteenth count was framed on the 4 Geo. 4, c. 34, therefore it was necessary to shew that the contract under which the workmen in that count mentioned had entered, had been made subsequently to the passing of that act. In the case of *Lindsay v. Leigh*, 17 L. J., M. C. 54, which was a case upon this very act of Parliament—4 Geo. 4, c. 34,—MAULE J., remarked, "For what appears in the information and commitment the contract might have been made before the passing of the act." Neither does the indictment say that the parties had entered into the service of Messrs *Perry* as artificers; and it does not say that the offence was *contra formam statuti*. It is not necessary that the indictment should conclude *contra formam statuti*; but it ought to have been shewn that the case was within the act of Parliament; and it does not shew that there was no lawful excuse for the absence of the workmen.

*384] The allegation that *the prisoners persuaded, by intoxicating, was not enough; was it indictable for a man to persuade another to take intoxicating liquor?

CAMPBELL C. J.—It is laid to the damage of the prosecutors.

Peacock cited *Reg. v. Selsby*, before ROLFE B.(a)

Parry, for the prisoner *Winters*.

The 3rd sect. 6 Geo. 4, c. 129, provides, that if any person by violence, threats or intimidation, or by molesting or obstructing, shall force, or endeavour to force any journeyman, manufacturer, workman, or other person hired or employed in any manufacture, trade or business, to depart from his hiring or work, or prevent or endeavour to prevent any workman from hiring himself to, or from accepting work or employment from, any person, such person shall, upon conviction, be liable to three months' imprisonment. The acts in themselves specified are not unlawful, unless they are effected by unlawful means,—the violence, the molesting, the obstructing, and the threats. If the unlawful means are left out of the indictment, no offence is stated. The conspiracy charged is not to do some illegal act;—take, for an ex-

(a) *Reg. v. Selsby and Others* is not reported in any of the Law Reports. The case was tried at the Assizes at *Liverpool*, and *Peacock* cited from a pamphlet printed at *Manchester*, edited by the attorney for the defendants. ROLFE B., in summing up to the jury, observed, "Those who are to employ labour may meet and say, we will not give more than such and such a rate, or we will stipulate for such and such a number of hours' work; we will make, in short, regulations beneficial to ourselves as employers, and we agree that we will not take any workman that require more. On the other hand, the workmen may meet and say, we will not work less than for such and such a sum, and if anybody think to employ us on low wages, we agree we will not work for them. And we agree to form a fund and support one another until we get them to come to proper terms." And again his Lordship remarked, "My opinion is, that if there was no other object than to persuade people that it was for their interest not to work except for certain wages, and not to work under certain regulations, complied with in a peaceable way, that it was not illegal."

ample, the first *count. It states that the prisoners conspired by molesting the workmen of [385 Messrs. *Perry*, hired and employed and working for them, to depart from their said hiring. Such an agreement is not illegal on the face of it. It may be that the prisoners had done all they are charged with having done, by lawful means. Suppose all the tin-plate workmen throughout the kingdom, had agreed that they would not work for Messrs. *Perry* of *Wolverhampton*, that would be perfectly lawful. The combination only becomes illegal by the means employed. The repeal of 39 & 40 *Geo.* 3, c. 106, seems to support that view. The thirteenth, fourteenth, fifteenth, and nineteenth counts, charged that the defendants had endeavoured by persuading, inducing, enticing and seducing the workmen of the prosecutors to leave their hiring. But it is not an indictable offence to induce a workman to leave his employment. In the case of *Reg. v. Daniel*, 1 Salk. 380, which was an indictment for enticing away an apprentice, the judgment was arrested, because that was a private injury, for which an action on the case lies. In *Nichol v. Martyn*, 2 Esp. 734, Lord *Kenyon* observed, "That seducing a servant and enticing him to leave his master, while the master by contract had a right to his services, was certainly actionable." At common law it is not a criminal offence to persuade a man to leave the employment of his master:—the thirteenth, fourteenth, and fifteenth counts, are the only counts in which it is said that workmen were under contract to Messrs. *Perry*. The case of *R. v. Collingwood*, 2 Ld. Raym. 1116, shews that it is not indictable to entice away an apprentice.

Lord CAMPBELL C. J.—There the point was a very simple one; but, it may be that it is an offence for several to conspire to do what one person may lawfully do.

*386] **Purry*. In the case of *Rex v. Pywell and Others*, 1 Stark. Rep. 402, which was an indictment for a conspiracy to cheat and defraud, by selling an unsound horse, Lord *Ellenborough* intimated that the case did not assume the shape of a conspiracy; the evidence would not warrant any proceeding beyond that of an action on the warranty for the breach of a civil contract.

ERLE J.—That case is overruled by *Reg. v. Kenrick*, 5 Q. B. 49.

Purry. There is also the case *Rex v. Turner*, 11 East, 228. It is submitted that all the counts of the indictment are bad for uncertainty, for they may be so construed as to disclose no indictable offence.

Cur. adv. vult.

Whateley Q. C., Keating Q. C., Peacock Q. C., and Purry, then were heard in support of a rule nisi for a new trial, on the grounds of the improper admission of evidence and of misdirection.

Cur. adv. vult.

At the sitting of the Court, on *Monday*, 24th of *November*, the judgment of the Court was delivered by Lord CAMPBELL C. J.

We are of opinion that all the counts of the indictment, excepting the sixteenth, seventeenth and nineteenth counts are perfectly good. With respect to those three counts, without expressing any opinion as to their validity, we think that there is sufficient doubt to induce the Court to grant a rule nisi in arrest of judgment. But it will be for the Counsel for the Crown to consider whether, under the circumstances, it would not be better to enter a *nolle prosequi* as to those three counts. As to the motion for a new trial on the ground of misdirection, and the admission of improper evidence, no ground has been

laid for *granting such a rule as to any of the defendants, except *Rowlands* and *Winters*. As to [*387 those defendants there was some evidence, but my brother ERLE, who presided at the trial, has said that he would have been better pleased if the jury had acquitted them, and he told the jury that their case was distinguishable from that of the other prisoners. With regard to *Rowlands* and *Winters*, then there might be a rule to shew cause, and if the rule should be made absolute, it would be followed by a new trial as to all the defendants; but I throw it out for the consideration of the Counsel for the Crown, whether, in concurrence with the feeling of Mr. Justice ERLE at the trial, it would not also be advisable to enter a *nolle prosequi* in respect of those two defendants.

Allen Serjt. After such an intimation from the Court, I beg to consent to enter a *nolle prosequi* as to the sixteenth, seventeenth and nineteenth counts, and also as to the defendants *Rowlands* and *Winters*. With respect to one of the three counts mentioned there is authority in support of it.

Lord CAMPBELL C. J.—We pronounce no opinion as to these counts; but a *nolle prosequi* having been assented to in respect of these and the two prisoners named, we are of opinion that there ought to be no rule to arrest the judgment, and no rule for a new trial. An objection has been made to the other counts in the indictment, on the ground that the means by which the molestation and obstruction was effected, are not set out; but that is unnecessary. The indictment is framed upon the act of Parliament. There may be a distinction in construing a *conviction* and an indictment; but the words of the statute having been employed upon which a legislative meaning has been stamped, this being an indictment at common law for a conspiracy to violate an act of Par-

liament, *it is enough to use the words of the
 *388] statute. Neither do we think that there was any
 misdirection in point of law. Mr. Justice ERLE gave his
 sanction to the law as laid down by the defendant's
 Counsel, that it was the right of the defendants, as En-
 glish workmen, to make the best of their labour, and to
 refuse to work unless the terms upon which they were
 invited to work were satisfactory.(a) As to the re-
 maining six defendants, therefore, there is no ground for
 a new trial, there being ample evidence against them
 upon all the counts. I will add, that after the most care-
 ful and elaborate consideration of the cases, I am satisfied
 that *Rex v. Turner*(b) is not law. That was an indict-
 ment for a conspiracy to go into a preserve in the night
 time, and armed with offensive weapons in search of
 game, which in itself is an indictable offence, and an
 agreement to commit an indictable offence undoubtedly
 amounts to a conspiracy.

Parry objected to the course that was about to be
 pursued, as prejudicial to the prisoners whom he repre-
 sented.

(a) Mr. Justice ERLE, in summing up to the jury, at *Stafford*, remarked: "Gentlemen, I state that the law is clear, that workmen have a right to combine for their own protection, and to obtain such wages as they choose to agree to demand; I say nothing at present as to the legality of other persons, not workmen, combining with them to assist in that purpose. As far as I know there is no objection, in point of law, to it: and it is not necessary to go into the matter, but I consider the law to be clear only to that point,—while the purpose of the combination is to obtain a benefit for the parties who combine,—a benefit which by law they can claim. I make that remark, because a combination for the purpose of injuring another is at once a combination of an entirely personal [different?] nature; and the law allowing them to combine for the purpose of obtaining a lawful benefit to themselves gives no sanction to combinations which have for their immediate purpose the injury or the hurt of another."

From *Mr. Serjeant Allen's copy of a Report of the Trial taken from Short-Hand Writer's Notes, printed at Wolverhampton for private circulation*. The report was referred to by the Counsel on both sides in the course of the argument, and each of the Judges was furnished with a copy.

(b) 13 East, 228: See 9 *Geo.* 4, c. 69.

*Lord CAMPBELL C. J.—*Rowlands* and *Winters* are in the same position as if they had been acquitted by the jury. [*389]

A *nolle prosequi* was then entered as to the sixteenth, seventeenth, and nineteenth counts of the indictment; and a *nolle prosequi* was also entered in respect of the defendants, *Henry Rowlands*, and *Thomas Winters*.

Rule nisi for arrest of judgment, and rule nisi for a new trial refused. (a)

[A combination among journeymen to compel by force of numbers and discipline, and by imposition of fines and penalties, other journeymen to join their society, and masters to employ none but members, is an unlawful conspiracy at common law. *The Commonwealth v. Hunt*, Thacher's Crim. Cases, 609.]

An indictment alleged that the defendants being journeymen bootmakers, unlawfully, &c., confederated and formed themselves into a club, and agreed together not to work for any master bootmaker or other persons, who should employ any journeyman or other workman, who should not be a member of said club, after notice given to such master or other person to discharge such workman: *Held*, that there was no sufficient averment of an unlawful purpose or mean. S. C. 4 Metcalf, 111.]

(a) Sentence was pronounced upon the other defendants by PATTESON J., on all the counts of the indictment except the sixteenth, seventeenth and nineteenth counts. Referring to the statute 6 Geo. 4, c. 129, that learned Judge remarked: The object of the Legislature was, that all masters and workmen should be left free in the conduct of their business. The masters were at liberty to give what rate of wages they liked, and to agree among themselves what wages they would pay. In like manner the workmen were at liberty to agree among themselves for what wages they would work, and were not restricted in so doing by the circumstance that they were in the employ of one or other of the masters. The intention of the Legislature was to make them quite free, but, seeing that intimidation might be used to carry out such agreement, it was enacted by the 6 Geo. 4, c. 129, s. 3, that if any person should by violence, threats, intimidation, molesting, or obstructing another, force, or endeavour to force, any workman to depart from his employ, or prevent him from accepting employment, &c., he should be liable to imprisonment for three calendar months. Most of the charges contained in the indictment referred to this act of Parliament, and charged a combination and conspiracy to do what was forbidden by the act. It charged the defendants with conspiring, by threats, intimidation, molestation, and obstruction, to force the workmen in the Messrs. *Perry's* employ to leave their employ, and to prevent other workmen from entering into their employ, and to compel the prosecutors to make alterations in the regulation and conduct of their business. The offence did not consist in the combination to raise their

REGINA v. ANN HARRIET NEWMAN. 1852.

On the trial of an indictment for perjury, to prove the fact of former trial, in the same Court of Oyer and Terminer, in which the indictment for the perjury is preferred: *Held*, that the production by the officer of the Court of the caption, the indictment, with the indorsement of the prisoner's plea, the verdict, and the sentence of the Court upon it, together with the minutes of the trial, made by the officer in Court, was sufficient evidence of it, without the production of the record, or a certificate of the same, under 13 & 14 Vict. c. 99, s. 13.

At the Session of Oyer and Terminer and Gaol Delivery holden for the jurisdiction of the *Central Criminal Court*, in the month of *December*, 1851, *Ann Harriet Newman*, was tried before the Right Honourable *James Stuart*

wages, but in the use of threats, intimidation, molestation, and obstruction. In this indictment there was no charge of any violence to the person or property of any person, and no evidence of that kind was given at the trial. The charge was one of using obstruction and molestation. The offence consisted in conspiring to do an act by unlawful means; and whether or not there had been such a conspiracy was a question for the jury, who had determined that the defendants were guilty. The Court had no reason to doubt the propriety of that verdict. When parties entered into such combinations with the intention of keeping only just within the law, there was great danger that some of their agents would go beyond those limits; and they could not *complain if juries came to *390] the conclusion that such were the original intentions of the parties. It had been said, that no threats or intimidation had been used; but the use of express words of intimidation was not necessary. *Green*, the delegate from *London*, had stated that the society had 20,000*l.* at their command, and that, if the prosecutors discharged a man, because he was a member of their association, they could stop the supplies, and they would not have a single hand upon their works. That might be construed as a threat, even by a man of strong nerve. The placard signed by *Peel*, containing violent and inflammatory language in reference to what was termed the oppressive conduct of the masters toward their men, and crying up the conduct of the men as being temperate in every respect, might be construed in the same way. There was nothing, therefore, to lead the Court to doubt the propriety of the verdict, or to say that the case was not within the act of Parliament. The act provided that the offence should be punishable summarily by three calendar month's imprisonment. But this was an indictment at common law upon the statute, and the offence was punishable with fine and imprisonment in the discretion of the Court.

Peel, *Green*, *Duffield*, *Woodnorth*, and *Gaunt*, were then sentenced to be imprisoned for three calendar months, and *Piatt* for one month.

Wortley, Q. C. Recorder of the city of *London*, for perjury.

The indictment charged the perjury to have been committed upon the trial of one *William Day*, for a misdemeanor (particularly mentioned, not stating whether followed by a conviction or acquittal), at a General Session of the Delivery of the Queen's Gaol of *Newgate*, holden for the jurisdiction of the *Central *Criminal Court* at Justice Hall, in the *Old Bailey*, in [*391 the suburbs of the city of *London*, on *Monday* the 12th day of *May*, in the year of our Lord, A. D. 1851, before the Right Honourable *John Musgrove*, Lord Mayor of the city of *London*, Sir *Edward Hall Alderson*, Knight, one of the Barons of her Majesty's Court of Exchequer, Sir *Thomas Noon Talfourd*, Knight, one of her Majesty's Justices of her Majesty's Court of Common Pleas, *Thomas Quedsted Finnis*, Esq., one of the Aldermen of the said city, *William Lawrence*, Esq., one of the Aldermen of the said city, *Russell Gurney*, Esq., Judge of the Sheriff's Court of the said city, and others their fellows justices assigned to deliver the said gaol of *Newgate* of the prisoners therein being.

No record regularly made up, or any copy thereof, nor any certificate in pursuance of the 13th section of 13 & 14 *Vict. c. 99*,(a) or of 22nd section of 14 & 15 *Vict. c. 100*,(b) was produced in evidence in support of the said allegation.

(a) 14 & 15 *Vict. c. 99*, s. 13. And whereas it is expedient, as far as possible, to reduce the expense attendant upon the proof of criminal proceedings: be it enacted that whenever in any proceeding whatever it may be necessary to prove the trial and conviction or acquittal of any person charged with any indictable offence, it shall not be necessary to produce the record of the conviction or acquittal of such person, or a copy thereof, but it shall be sufficient that it be certified or purport to be certified under the hand of the clerk of the Court or other officer having the custody of the records of the Court where such conviction or acquittal took place, or by the deputy of such clerk or other officer, that the paper produced is a copy of the record of the indictment, trial, conviction and judgment or acquittal, as the case may be, omitting the formal parts thereof.

(b) 14 & 15 *Vict. c. 100*, s. 22. A certificate containing the substance and

*392] *In the absence of such evidence, it was proposed to prove the said averment, and that the trial mentioned in the indictment, had taken place by means of the original minutes, from which the record would have been perfected, if made up in due course.

The practice in the office of the clerk of the *Central Criminal Court*, with reference to these minutes, was proved to be as follows. When a prisoner is called upon to plead, his plea, if not guilty, is entered by the officer present in Court upon the indictment, and signified by the letter "P." afterwards; and when the prisoner is tried, his offence is shortly entered by the officer present in Court, in a minute book kept for the purpose, and the plea of the defendant in such book is denoted by the words "puts." If the verdict be guilty, such verdict immediately follows the word "puts," and is simply entered by the officer present in Court as "guilty," and the sentence is then in like manner briefly entered immediately after such verdict. These minutes are afterwards transcribed without abbreviations upon the indictment, and the original "P." erased. At the end of every session, the indictments found at such sessions are placed upon a file, together with two captions, one called the oyer and terminer caption, and the other the caption of the gaol delivery. Every indictment placed upon such file, would, according to the practice of the office, have been found at the session of oyer and terminer, expressed in such caption. The caption of gaol delivery, indicates,

effect only (omitting the formal part) of the indictment and trial for any felony or misdemeanor, purporting to be signed by the clerk of the Court or other officer having the custody of the Records of the Court where such indictment was tried, or by the deputy of such clerk or other officer, (for which certificate a fee of six shillings and eightpence and no more shall be demanded or taken), shall upon the trial of any indictment for perjury or subornation of perjury be sufficient evidence of the trial of such indictment for felony or misdemeanor, without proof of the signature or official character of the person appearing to have signed the same.

that such a session of gaol delivery was held, and all the proceedings subsequent to the finding of the bill entered upon the indictment, in absence of an entry to the contrary, are referable to the session of gaol delivery expressed in the caption of gaol delivery.

*An officer of the *Central Criminal Court* produced from the office of the clerk of the Court, a [*393 file of indictments having a caption of oyer and terminer attached thereto, also a caption of gaol delivery. The latter was in the following words, "*Central Criminal Court, to wit. At the general Session of the delivery of the Queen's gaol of Newgate, holden for the jurisdiction of the Central Criminal Court at Justice Hall, in the Old Bailey, in the suburbs of the city of London, on Monday, the twelfth day of May, in the fourteenth year of the reign of our Sovereign Lady Victoria, by the grace of God of the United Kingdom of Great Britain and Ireland Queen, Defender of the Faith, before John Musgrove, Esq., Mayor of the city of London, Sir Edward Hall Alderson, Knight, one of the Barons of our said Lady the Queen, of her Court of Exchequer, Sir Thomas Noon Talfourd, Knight, one of the Justices of our said Lady the Queen, of her Court of Common Pleas, Thomas Kelly, Esq., Sir Chapman Marshall, Knight, John Kinnersley Hooper, Esq., Aldermen of the said city, the Right Honourable James Stuart Wortley, Recorder of the said city, William Hunter, Esq., Thomas Sidney, Esq., William Lawrence, Esq., and other of the Aldermen of the said city; Edward Bullock, Esq., Common Serjeant of the said city, Russell Gurney, Esq., Judge of the Sheriff's Court of the said city, and others their fellows justices of our said Lady the Queen, assigned to deliver the said gaol of Newgate of the prisoners therein being.*"

Amongst the indictments produced was that against *William Day*. There were written upon the face of

it the following words, "Surrenders and puts himself. Jury say guilty on the 3rd, 4th, and 6th counts only. To be imprisoned in the House of Correction at *Clerkenwell*, one year." There was also produced from the *394] *custody of the clerk of the Court, a certain minute book, in which was the following entry:—

"Surr^d. & puts. Guilty on 3rd 4th & 6th Co^{ts}.

12 Cal. Mos. H. C. with h^d. l.

"M. 34 *William Day*—By false pretences and false representations *did procure* one Ann Harriet Newman, a woman under the age of 21 yrs. to have illicit carnal connection with s^d. pris^r.

2nd Ct. did attempt and endeavour to procure.

3rd Ct. like 2nd Count to have connection with a man unknown.

4th Ct. Consp^y.(a) to procure her to have connection with a man unknown.

5th Ct. Assault on Ravish.

6th Ct. Common Assault."

An officer of the *Central Criminal Court* deposed that he remembered the trial of *Day*, and was present on that occasion; that he took his plea of Not Guilty, and wrote the letter "P." upon the indictment. That "P." according to the course of business in the office, had been erased, and the entry in the books, *i. e.* "surr^d. and puts," was in the handwriting of the witness, and from that, as well as from his personal recollection on the subject, he knew that the person to whom that entry related had been tried; that the entry upon the indictment was made by the witness, from the said minutes entered in the book, and that that entry, together with the caption and the entry in the book, would be the materials from which the record of such trial would be made up.

It was objected upon the trial that the evidence before set forth was insufficient to maintain the allegations contained in the indictment; that an authentic record, or one of the certificates before mentioned, ought to have

(a) See *Reg. v. Mears and Chalk*, 2 Den. C. C. 79.

been produced; that in fact the evidence given was no more than parol evidence of what ought to have been proved by record, or some other recognised and authentic document, and that the prisoner was entitled to her acquittal for want of *proper evidence. The learned Recorder, however, ruled the contrary, and as the [*395 other necessary facts were proved to the satisfaction of the jury, they found the prisoner guilty; but considering it doubtful whether he was right in his ruling, the Recorder postponed judgment on the said indictment, and committed the prisoner to the gaol of *Newgate*, in order that the opinion of the Judges might be taken upon the subject.

On *Saturday*, the 24th *January*, A. D. 1852, this case was argued before JERVIS C. J., ALDERSON B., COLERIDGE J., WIGHTMAN J., and CRESSWELL J.

Payne, for the Crown, submitted that the evidence adduced to prove the fact of the trial of *William Day* was sufficient, that trial having been in the same Court in which the indictment against the prisoner *Ann Harriet Newman* was found. It was urged at the trial by the Counsel for the prisoner, that by 14 & 15 *Vict.* c. 100, sect. 22, it was necessary either that the record, or a certificate containing the substance and effect of it should be produced; but *John Horne Tooke's case*, 25 *St. Tr.* 447, shewed that where the proceeding was in the same Court as that in which the former trial took place, the minutes produced by the officer of the Court were sufficient.

No Counsel appeared for the prisoner.

JERVIS C. J.—The Court entertain no doubt that the evidence was rightly admitted, and was sufficient to prove the fact of the former trial. The officer of the Court produced the caption, the indictment and the

minutes, shewing the proceedings at the trial, and the judgment of the Court.

ALDERSON B.—The officer of the Court, in fact produced all the materials from which the record must have been drawn up. That surely is sufficient.

The rest of the Court concurred.

*396] *REGINA v. THOMAS BOULTER. 1852.

Perjury was assigned on a statement made by the prisoner upon a trial at *Nisi Prius*, that in *June*, 1851, he owed no more than one quarter's rent to his landlord. The prosecutor swore that the prisoner owed five quarter's rent at that date; and to corroborate the prosecutor's evidence, a witness was called, who proved that in *August*, 1850, the prisoner had admitted to him that he then owed his landlord three or four quarter's rent: *Held*, that this was not such corroboration as is necessary to sustain an indictment for perjury.

At a session of Oyer and Terminer and Gaol Delivery, holden for the jurisdiction of the *Central Criminal Court*, in *December* last, *Thomas Boulter* was tried before the Right Honourable *James Stuart Wortley*, Q. C., Recorder of the city of *London*, for perjury. The indictment alleged that the defendant had been a tenant to one *George Healey* (the prosecutor) of a certain dwelling-house and premises, under a certain rent, and that in the month of *June*, A. D. 1851, the said *George Healey* had distrained upon the defendant for certain arrears of that rent.

The indictment assigned for perjury that the defendant *Boulter* had, in substance, falsely sworn amongst other things upon a trial at *Nisi Prius*, upon which the question was material, *that there was only one quarter's rent of the rent aforesaid due at the time of the said distress.*

Upon the trial before the Recorder, Mr. *Healey*, the prosecutor, positively swore to the fact of there being *five*

quarters of the rent due at the time of the said distress, viz. in *June*, 1851, and produced his books, by which he refreshed his memory, and proved the last payment of rent to have been for the rent due at *Christmas*, 1849.

For the purpose of corroborating his statement, and shewing by the oaths of two witnesses the falsity of the matter sworn to, *John Healey*, the son of the prosecutor, was examined, who deposed to a conversation with the defendant in the month of *August*, A. D. 1850, and that in that conversation the defendant *Boulter* *admitted that three or four quarters of the said rent [*397 were then due.

A receipt from the prosecutor to the defendant was produced upon the trial, purporting to be a receipt for the said rent to *Christmas*, 1850. This receipt the prosecutor swore had been given through error, and ought to have been a receipt for the rent to *Christmas*, 1849, only. No evidence of payment of rent was given by or on behalf of the defendant subsequently to *August*, 1850.

It was contended on behalf of the defendant, that the fact of more than one quarter's rent being due at the time of the distress, was not sufficiently made to appear by the oath of two witnesses for the case to be left to the jury; that the statement of *John Healey*, as to the admission of the defendant, went no further than to establish the fact that in *August*, A. D. 1850, rent was due, but did not confirm the prosecutor in his statement of the *five* quarter's rent being unpaid at the time of the distress, or in his explanation of the error in the receipt.

The learned Recorder, however, overruled the objection, and left the matter to the decision of the jury, who convicted the defendant; whereupon the Recorder postponed judgment upon the said indictment, and committed the defendant to the gaol of *Newgate*, in order that the

opinion of the Judges might be taken upon the aforesaid facts.

On *Saturday, 24th January, A. D. 1852*, this case was argued before JERVIS C. J., ALDERSON B., COLERIDGE J., WIGHTMAN J., and CRESSWELL J.

Clarkson and Hance, for the Crown. *O'Brien*, for the prisoner.

O'Brien. It is apprehended that the only question that arises in this case is, does the evidence of *398] *John Healey*, *as to the state of accounts between the prosecutor and the prisoner in the month of *August*, in the year 1850, afford corroboration to the oath of the prosecutor as to the state of the accounts between these parties in the month of *June*, 1851, or as to his statement respecting the error in the receipt? It is submitted, that it is no corroboration whatever. The perjury assigned is, that the defendant swore there was only *one* quarter's rent due in *June*, 1851; *George Healey*, the prosecutor, in contradiction to this, swears that, at that date, *five* quarter's rent was due. Now what is brought in corroboration of the prosecutor's statement? Proof of an admission made by the prisoner to *John Healey* in *August*, 1850, that three or four quarter's rent was then due by him. This affords no corroboration of the fact in issue. In all the cases from that of *Rex v. Muscott*, 10 Mod. Rep. 192, which was decided by *Parker C. J.*, to that of *Reg. v. Parker*, Car. & M. 646, which was a case before *Tindal C. J.*, the rule has been that there must be two witnesses to disprove what has been sworn, or one witness with documentary evidence, some admission or some circumstances to supply the place of a second witness. It is submitted, that the corroboration must be that which goes towards the proof of the fact of transaction in issue, and which would be some evidence of it

if it stood alone, and not that which tends only towards its probability. It was indeed ruled by PATTESON J., in *Reg. v. Roberts*, 2 Car. & Kir. 607, and *Reg. v. Gardner*, 8 Car. & P. 737, that there need not be two witnesses to corroborate every fact, as if the false swearing be that two persons were together in a certain place at a certain time; but in all these cases there must be two witnesses, or something instead of a second witness, speaking to facts which go to prove the circumstance in question.

CRESWELL J.—Assume this to be the case; perjury *assigned, that A. B. and C. D. were not to- [*399
gether at such a place upon a particular day. You have two witnesses to disprove this. One says, I saw them together in the place; the other swears that he saw them somewhere else together in the direction of the place, on the same day; that would tend to prove the fact of their being together in the place in question.

COLERIDGE J.—Suppose a man swore that he was not at *Plymouth* on such a day. One witness swears that he saw him in *Plymouth* on that day; and to corroborate his evidence, a person is called who states that he saw him in the railway train between the terminus and *Plymouth*?

ALDERSON B.—The perjury here assigned is, that the defendant swore that there was only *one* quarter's rent due in *June*, 1851;—and the prosecutor swears that five quarter's rent was then due. This is only oath against oath. His son, who is called in corroboration, speaks to an admission of the prisoner, that he owed three or four quarter's rent *a year before*. But that money may have been paid intermediately. There are not two oaths to one fact in the case.

O'Brien. The question of fact in issue, is the state of accounts in *June*, 1851; how can the state of accounts in *August*, 1850, go to prove that?

CRESSWELL J.—It carries the case no farther than the production of the lease would do.

COLERIDGE J.—The rule as to corroboration in perjury is, that there must be something more than the oath of one person ; but there need not be two witnesses.

O'Brien. The rules of the Ecclesiastical Courts as to corroboration in proof of adultrey, are analogous to those of perjury. In *Kenrick v. Kenrick*, 4 Hagg. New Rep. 114, the learned Judge laid it down that there must be two witnesses, or one witness, and circumstances of corroboration ; and in *Simmons v. Simmons*, *1*400] Roberts. Eccl. Rep. 566, it was ruled by Dr. *Lushington*, that evidence of the mere probability of a transaction, is not evidence to corroborate a single witness. To constitute evidence corroborative, the evidence must have relation to the transaction itself.

ALDERSON B.—In perjury there must be something to shew that one is to be believed more than the other.

O'Brien. Here, it is submitted there is no confirmation of the prosecutor's evidence. It is perfectly consistent with the defendant's statement, that in *August*, 1850, three quarters' rent was due.

Clarkson, for the Crown.

It is quite a mistake to suppose, that two witnesses are necessary to contradict the false oath upon which the perjury is assigned. If there be something more than the oath of one, then that is sufficient to warrant the Judge in putting the case to the jury ; for, it is not for the Judge to estimate the weight or nature of the evidence, but for the jury. That is a matter of fact for the jury ; and where the corroboration is weak, the Judge ought to act as COLERIDGE J. did, in the case of *Reg. v. Yates*, Car. & M. 132, where his Lordship said, "I think that the case must go to the jury, but I also think without the slightest chance of a verdict for the Crown. The rule

that the testimony of a single witness, is not sufficient to sustain an indictment for perjury, is not a mere technical rule, but a rule founded on substantial justice; and evidence confirmatory of that one witness in some slight particulars only, is not sufficient to warrant a conviction." Some cases in the Ecclesiastical Courts have been cited; but there is not much light to be derived from them. *Pitt Taylor*, 2 Pitt Tayl. Ev. 654, says, "In the Ecclesiastical Courts, the rule requiring a plurality of witnesses is carried far beyond the verge of common sense. According to the Canon Law, it seems that in the case of *a Cardinal charged with incontinence, the *probatio*, in order to be *plena*, must be established by [*401 no less than *seven eye-witnesses*." The same learned author (2 *Pitt Tayl.* 649), thus states the rule as to corroboration in perjury,—“It seems to have been formerly thought, that in proof of the crime of perjury, two witnesses were *necessary*; but this strictness, if it was ever the law, has long since been relaxed; the true principle of the rule being merely this, that the evidence must be something more than sufficient to counterbalance the oath of the prisoner, and the legal presumption of his innocence.” A letter or document would, in some cases, be sufficient corroboration.

ALDERSON B.—There must be something to shew that one is more to be believed than another.

Clarkson. Here there was the evidence of the prosecutor's son.

WIGHTMAN J.—If the case had been reversed, and the prisoner had preferred an indictment against the prosecutor for perjury, would not the prosecutor have found himself in a difficulty?

Clarkson. There would have been only the oath of the prisoner against the oath of the prosecutor.

WIGHTMAN J.—More than that. There would have

been the oath of the prisoner, and in corroboration of it, the receipt for rent in the handwriting of the prosecutor, dated *Christmas*, 1850.

Clarkson. The evidence of *John Healey* was some corroboration.

ALDERSON B.—It does not touch the case; there is nothing in it relevant to the issue. There was a year's interval between the transaction he speaks of, and the time when the prosecutor swears five quarter's rent was due.

Clarkson. There was no evidence given by the defendant of the payment of rent in the interval.

*402] COLERIDGE J.—Can the proof of perjury depend *upon evidence to be brought forward by the prisoner in his defence?

JERVIS C. J.—Suppose a witness is called, who says I know that the prisoner was a tenant of the prosecutor, would that do in corroboration?

Clarkson. Perhaps not; but where there is a probability in favour of the prisoner rather than of the prosecutor, the case ought to be left to the jury.

ALDERSON B.—Then suppose one had shuffled in giving his evidence,—and the other gave his evidence in a straightforward way, there the probability would be in favour of the latter, and I should certainly be inclined to believe him more than the other; in that case ought that circumstance to be put to the jury as corroboration?

Clarkson. It is submitted that it is for the jury to weigh the probabilities of the case, and decide as to the nature of the corroboration.

ALDERSON B.—There must be something in corroboration which makes the fact sworn to not true, if that be true also.

JERVIS C. J.—I do not think it necessary upon the

present occasion to lay down any general rule as to corroborative testimony in perjury. There must be something in the case to induce the jury to believe one rather than the other. I do not think that in this case there is such evidence; for the oath of the son is quite as consistent with the oath of the prisoner as with that of the prosecutor. There is, therefore, no corroboration of the prosecutor's evidence. The case must be made out by the prosecutor, and not by the prisoner, and the guilt of the prisoner cannot depend upon whether he produces evidence or not in his defence.

The rest of the Judges concurred.

Note.—Mr. Best, in his *Treatise on the principles of Evidence*, suggests the following, as the true criterion in estimating the quantity of *evidence, necessary to prove the falsity of the matter on which the perjury is assigned: [*403 —“ We apprehend, that the old rule and reason of the matter are not satisfied, unless the evidence of each witness has an existence, and probative force of its own, independent of the other, so that, supposing the charge to be one of those in which the law allows condemnation, on the oath of a single witness, the evidence of either would form a case, proper to be left to a jury, or would at the least, raise a strong suspicion of the guilt of the defendant.”—p. 440; and see Greenl. Ev. § 257.

REGINA v. WILLIAM POWELL.

The prisoner was indicted for having burglariously broken and entered the house of the prosecutor in the night-time, with intent to steal the “goods and chattels” therein. The jury found that he broke and entered the house with intent to steal mortgage deeds:—*Held*, that being subsisting securities for the payment of money, mortgage deeds are *choses in action*, and as, such were improperly described in the indictment as goods and chattels, and, consequently, that the conviction was wrong.

William Powell was tried before Mr. Justice TALFOURD, at the last assizes for *Brecon*, on an indictment charging him with burglariously breaking and entering the dwelling-house of *David Williams*, in the night-time, with intent to steal goods and chattels therein.

The prisoner, in 1843, borrowed of *David Williams* the sum of 600*l.*, and executed to him a mortgage in fee of freehold land; and in the year 1848 he borrowed of *Williams* the further sum of 200*l.*, and executed another mortgage by way of further charge on the same land. Both deeds contained the usual provisos of redemption and covenants for the payment of principal and interest of the sums advanced. *Williams*, the mortgagee, brought an action of debt against the prisoner for the recovery of these sums remaining unpaid, which was pending for trial when the burglary was committed.

*404] *The evidence proved, that the prisoner committed the burglary for the purpose of stealing the mortgage deeds; and, in answer to a question put to the jury by the Judge, after they had delivered a verdict of guilty, they stated that the offence was committed with intent to steal the mortgage deeds. In a bundle with the first deed, which had been kept in a drawer ransacked on the night of the burglary, was a satisfied and cancelled bond of a former mortgage belonging to *Williams*, the mortgagee, and which was afterwards kept with both mortgage deeds, but then was in fact at the office of the mortgagee's attorney when the burglary was committed.

On the part of the prisoner it was objected that the intent was not properly alleged in the indictment, as, though the mortgage deeds might be the subject of statutable larceny as "valuable securities," they were not "goods and chattels." His Lordship overruled the objection, thinking that the mortgage deeds being substantially securities for debts, and containing covenants to pay principal and interest, were distinguishable from deeds which, as "savouring of the realty," were not the objects of larceny at common law, and that the parchments on which the covenants were inscribed were chat-

tels, if, indeed, the words "goods and chattels" might not be rejected as surplusage.

The prisoner was sentenced to ten years transportation, but doubts having been suggested if he was properly convicted, on the objections as applied to the facts, the learned Judge reserved this case for the judgment of the Court of Criminal Appeal; the prisoner remaining in this country under his sentence.

The Counsel for the prosecution also relied on the satisfied bond as, at all events, the subject of larceny.

The question for the Court is, whether the conviction is right?

*On *Saturday, 24th January*, A. D. 1852, this case was argued before JERVIS C. J., ALDERSON B., [405 COLERIDGE J., WIGHTMAN J., and TALFOURD J.

Slade Q. C., and *T. Allen*, for the prisoner.

Slade referred to the indorsement of the verdict on the briefs of Counsel at the trial—"Guilty of breaking into the house of the prosecutor by night, with intent to steal the mortgage deeds only."

JERVIS C. J.—The statute only gives us power to deal with the case reserved for our consideration, and we cannot enter into any other question.

ALDERSON B.—The jury having found that the offence was committed with intent to steal the mortgage deeds, we shall infer that they find him guilty of that intent only.

Slade. The charge against the prisoner at the trial was, that he had committed burglary. Burglary is defined as a breaking and entering the mansion-house of another in the night, with intent to commit some felony within the same, whether such felonious intent be executed or not. In order to constitute burglary, there must be the intent to commit a felony. If it appear that the breaking and entering was to commit a mere trespass, it will not amount to a burglary, and the party

injured will be left to a civil remedy. It is necessary to prove the intent laid in the indictment as laid. Now it is alleged in the indictment, that the prisoner broke and entered the dwelling-house of the prosecutor with intent to steal the *goods* and *chattels* therein. It must, therefore, appear that the prisoner intended to steal the goods and chattels. But the jury find that the intent of the prisoner was to steal the mortgage deeds. In the year 1843, the prisoner borrowed the sum of 600*l.* from the prosecutor, and then executed to him a mortgage in fee of freehold land; and, in the year 1848 borrowed of him a further sum of 200*l.*, executing another mortgage by way *406] of further *charge on the same land. The prosecutor brought an action of debt against the prisoner to recover these sums; and the prisoner supposing that these mortgage deeds were at the house of the prosecutor, broke into his house with intent to possess himself of these deeds, though, in fact, they were at the office of the solicitor. The satisfied bond, it is assumed, is out of the question.

ALDERSON B.—The question is, whether mortgage deeds are “goods and chattels?”

Slade. The intent *proved* is to steal mortgage deeds. The intent *laid* is to steal goods and chattels. It is submitted then, *first*, that mortgage deeds are not goods and chattels, because they savour of the realty.

WIGHTMAN J.—Would they go to the heir or to the executor?

Slade. The Courts have differed in their views upon the subject. But it is not material, for if it should be held that they would go the executor, the prisoner is prepared to contend that they are *choses in action*,—securities for money.

TALFOURD J.—You are aware of the case, *R. v. Vise*. (a)

Slade. The case of *R. v. Vise* is distinguishable from

(a) 1 Moo. C. C. 218.

the present. Your Lordships are aware that it is laid down in the authorities, that the box in which charters concerning the realty were kept, could not be the subject of larceny, on the principle *et omne majus dignum trahit ad se minus*.^(a) It was held, that the character of the box was changed by its relation to the realty. So here the inferior character of this deed as a security for money is merged in its character as a conveyance of a real estate. No larceny could at common law be committed of a title *deed to a real estate; yet every [*407 such deed was once parchment, which might have been the subject of larceny; the parchment is engrossed, and finally it is sealed, when it becomes a deed savouring of the realty. Such a deed may have a picture or a map upon it, which by itself would be of goods and chattels, but still at common law, because it savoured of the realty, no larceny could be committed of it.

COLERIDGE J.—Both deeds contained the usual proviso for redemption.

Slade. That is so. To steal any paper or parchment being evidence of the title, or part of the title of any real estate, is a statutable misdemeanor, by 7 & 8 Geo. 4, c. 29, sect. 23. The jury have, therefore, found the prisoner guilty of breaking into the house of the prosecutor with intent to commit a *misdemeanor*; but, in order to constitute burglary, there must have been an intent to commit a felony.

JERVIS C. J.—Does not that mean any deed that would shew a clear title to the estate?

Slade. A mortgage deed, as being a security for money, is a *chose in action*. At common law no larceny could have been committed in respect of a deed, a security for money, or an evidence of title; in the last case,

^(a) *Inst.* 109, where Lord COKE cites 10 E. 4; 14 Lib. 8, fo. 33 b. See also *Noy's Maxims*, M. 17.

because it savoured of the realty, in the other, because it was a *chose in action*. And acts of Parliament were passed for their protection, 2 *Geo.* 2, c. 25, s. 3, repealed, and 7 & 8 *Geo.* 4, c. 29, ss. 5, 23. At common law the sheriff could not under a *fi. fa.* seize securities for money; and he was only empowered to do so by 1 & 2 *Vict.* c. 110, s. 12. In the case of *Reg. v. Perry*, 1 *Dën. C. C.* 69, a case before COLERIDGE J., where the prisoner was charged in one count of the indictment with stealing a cheque, and in another count with stealing a piece of paper; it was held, that supposing the cheque to *408] *have been a void cheque, it would still sustain the charge laid in the second count. There, whether the thing stolen was a cheque, or a piece of paper,—*quacunqve via*,—the prisoner was guilty. But here the case is different, for the character of the parchment has merged into the deed. The prosecutor has chosen to allege in the indictment, that the intent of the prisoner was to steal goods and chattels, and it must be proved as laid. In *Westbeer's case*, 1 *Leach, C. C.* 12, the Judges held that the prisoner could not be convicted of stealing a parchment, because it savoured of the realty. It was suggested at the trial that the words “goods and chattels,” might be rejected from the indictment as surplusage. But how then would the case stand?—That the prisoner broke and entered *with intent to steal*. Now there are many things to steal which would not amount to felony. The stealing of some things is no more than a misdemeanor, and the stealing of others, such as a dog or a cat, or animals in the eye of the law of no value, would be no indictable offence. If you reject the words “goods and chattels,” then it would not appear whether the intent of the prisoner was to commit a felony, or a misdemeanor, or some lesser offence.

JERVIS C. J.—The indictment would be bad in arrest

of judgment, unless it appeared that the intent of the prisoner was to commit a felony.

Slade. An intent to steal "goods and chattels" is laid in the indictment; but the evidence shews that the intent was to steal *choses in action*.

TALFOURD J.—You say that mortgage deeds are not valuable securities?

Slade. They are *choses in action*,—not goods and chattels.

WIGHTMAN J.—The mortgage deeds are chattels are they not?

**Slade.* Not at common law.

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WIGHTMAN J.—There are chattels *real* as well as chattels *personal*. May it not then be said that the deeds are well described in the indictment as "goods and chattels?"

ALDERSON B.—When by the common law, stealing chattels personal only amounts to the offence of larceny, and an indictment alleges that goods and chattels are stolen, proof that chattels real were stolen, would not sustain that allegation. If the whole sentence "with intent to steal goods and chattels therein," be struck out of the indictment, then, all that remains is, that the prisoner broke into the prosecutor's house, unless the word "burglariously" can be said to imply the intent to commit felony.

JERVIS C. J.—That would not do. The word *burglariter* cannot aid the statute. It would be no more than saying that a man *feloniously* walked along the street, which *might* mean that his purpose was to pick pockets.

No Counsel appeared for the Crown.

Cur. adv. vult.

On *Tuesday, 27th January, A. D. 1852*, the following judgment was read by

JERVIS C. J. (a)—We must assume, from the finding of the jury, that the prisoner broke into the house of the prosecutor with intent to steal the mortgage deeds in their uncanceled state. This finding makes it unnecessary to consider whether the securities savour of the realty or are evidence of the title to real estate so as not to be the subject of larceny, because, being subsisting securities for the payment of money, *they are
*410] clearly *chooses in action*, and, as such, are not properly described in the indictment as goods and chattels. This was ruled in *Cayle's case*, 8 Co. 33, a, 3 Inst. 109, and *Chanell v. Robotham*, Yelv. 68, where it was decided that a bond could not be included under the words *bona et catalla*, though it was objected that the parchment and wax were such, and might pass by that name, yet forasmuch as the debt included and wrote upon it is the principal, the words of the grant ought to comprehend the name of the principal. In *Vyse's case*, Mood. C. C. 218, referred to on the argument, the notes had been paid, and though reissuable, were not, at the time of the larceny, securities for the payment of money. The paper and stamp upon which they were written were, therefore properly described as goods and chattels.

For these reasons we are of opinion that the conviction was wrong.

REGINA v. ROBERT PAUGH BLAKEMORE, Esq.

The defendant was indicted for the non-repair of a highway, which it was alleged he was liable to repair *ratione tenuræ*, in respect of certain lands called the *Saw-pit Field*.

(a) The other Judges present were Lord CAMPBELL C. J., POLLOCK C. B., PARKER B., ALDERSON B., PATTERSON J., COLERIDGE J., MAULE J., WIGHTMAN J., CRESSWELL J., PLATT B., WILLIAMS J., and TALFOURD J.

To prove this liability, evidence was given of the conviction of *W. S.*, a former owner and occupier of the same lands, for the non-repair of the same highway, shewing that in the year 1801 a presentment had been preferred against him, alleging his liability to repair it *ratione tenuræ*, to which he pleaded guilty. Evidence was also given of the repair of the said highway subsequent to the conviction of *W. S.*, by the occupiers of the lands, of which the *Saw-pit Field* formed part; that public notice was given when the said *Saw-pit Field* was offered for sale of the liability to repair the highway in question, and that the defendant, who purchased the lands after such notice, was now the owner and occupier of the same *Saw-pit Field*.

Held, by all the Judges, that there was evidence to go to the jury of immemorial usage, and of the defendant's liability to repair the highway *ratione tenuræ*.

Held, by PARKER B., ALDERSON B., PATTERSON J., and COLERIDGE J., that the defendant was *estopped* from denying his liability in consequence of the conviction of *W. S.*, with whom he was a privy in estate.

Held, by PLATT B., that the immemorial usage, in respect of which the defendant was charged, was not conclusively established, and that the question of *estoppel*, not having been raised at the trial, was not now matter for the consideration of the Judges.

THE defendant was indicted at the *Shropshire October Sessions*, A. D. 1849, in pursuance of an order of *two [411 justices made at a Special Sessions for the Highway in and for the division of *Ford*, in the said county of *Salop*, for not repairing two portions of a public carriage highway in the said division, the one of the length of two hundred and forty-one yards, and of the breadth of eight yards; and the other of the length of two hundred and forty-nine yards, and of the breadth of eight yards, situate in the parish of *St. Chad*, in the said county of *Salop*, which it was alleged he was liable to repair, *by reason of his tenure* of certain lands and tenements situate in the said parish. At the *Shropshire April Sessions*, A. D. 1851, the defendant pleaded not guilty, and the hearing of the case was thereupon proceeded with.

The evidence on the part of the prosecution, so far as the same relates to the question of law, hereinafter reserved for decision, consisted of—

1st. The record of conviction upon a presentment by a justice of the peace for the town and liberties of *Shrews-*

bury, at the *April* Sessions, 1801, (within the jurisdiction of which Court the said highway was then situate,) of one *William Smith*, Esquire, for not repairing a certain highway (which was proved to be the same as that mentioned in the indictment), *by reason of his tenure and occupation* of certain lands and tenements called the *Saw-pit Field* in the parish of *St. Chad* aforesaid. The said presentment alleging that "the said *William Smith* and all other occupiers of the said lands and tenements, *by reason of his and their tenure and occupation of the said lands, the said highway from time immemorial, had repaired and of right ought to have repaired*, when and as often as need or occasion had required;" upon which presentment the said *William Smith* was convicted on his own confession, and adjudged by the Court to pay a fine of one penny, which was paid by him accordingly.

*2ndly. That the highway in question was, *412] subsequently to the before mentioned conviction, namely, between the years 1810 and 1843, at different times repaired by the occupiers of the farm, of which the lands called the *Saw-pit Field* formed a part, and the expense of which repairs was repaid to such occupiers by the said *William Smith* during his lifetime, and by the agent of his representatives after the death of the said *William Smith*.

3rdly. That the said land called the *Saw-pit Field* was with other land, offered for sale by public auction by the representatives of the said *William Smith*, on the 21st of *August*, 1840, and that the particulars of such sale contained the following statement, *viz.*, "That the proprietor of Piece No. 2, (which was the *Saw-pit Field*), is liable to the repair of 490 yards of roads near thereto, as swewn in plan, which will be produced at the time of sale, and may be, in the mean time, seen at the office of the vendor's solicitor in *Shrewsbury*," being the 241 yards

and 249 yards of highway mentioned in the present indictment; and further, that at such sale by auction, the defendant, *Robert Baugh Blakemore*, was a bidder for the lot which included the said piece of land.

4thly. It was proved, on the part of the prosecution, that the defendant was the owner and occupier of the said lands called the *Saw-pit Field*, formerly belonging to the said *William Smith* at the time when the highway was alleged to be out of repair on behalf of the defendant. The evidence given by the defendant with reference to the question of law reserved, consisted of,

1st. An award, dated 29th *June*, A. D. 1768, of *Thomas Bell*, *John Probert* and *William Corfield*, commissioners, which recites certain articles of agreement, dated 9th *July*, 1767, for the inclosure of a certain common or waste land called *Bickton Heath*, *in the township of *Bickton*, and whereby the said commissioners [*413] were authorized to allot the common and waste lands among the several persons having right of common thereon.

And by the said award, the commissioners did allot to *John Hollings*, as proprietor of lands and tenements with common to the same belonging, a parcel of land marked No. 13, containing by measure 2 A., 2 R., 27 P., and bounded as therein described, which piece of land was admitted to be the same as that called the *Saw-pit Field* in the before mentioned conviction.

The said award then further proceeds to state, that the commissioners had further ascertained, set out, and appointed through the lands intended to be inclosed (*inter alia*,) one public, horse, carriage and drift road, over the east end of the common, which road was admitted to be the highway mentioned in the present indictment. The said award then contains the following provisions.

“And the said public horse, carriage, and drift roads *being now very ruinous and threatened to be indicted*, we the said *Thomas Bell, John Probert, and William Corfield*, further award, order, direct, and appoint, that the same shall be forthwith repaired, and for that purpose that the sum of fifty pounds shall be raised by the said several proprietors in the space of one month from the date thereof, in the proportions mentioned in the schedule annexed, and paid into the hands of Mr. *Thomas Wright* and Mr. *William Probert*, to be employed as aforesaid, and that whatever further sum of money shall be wanted to complete the repair of the said roads, shall be raised in the like proportions, and paid in one month after demand, by the said proprietors, into the hands of the said *Thomas Wright* and *William Probert*, or any other person appointed to receive the same, and be employed for *414] the purpose *aforesaid. And we do also award that the said public roads shall be at all times for ever hereafter repaired, and kept in repair by and at the expense of the said proprietors in the like proportions, and that the money to be raised for that purpose shall be paid into the hands of the surveyor of the highways, or such other person or persons as shall be from time to time appointed by the said proprietors, or the major part of them for that purpose.”

2dly. Articles of agreement, dated 1st June, A. D. 1797, between *John Mytton*, Esquire, and the said *William Smith*, and several other parties, proprietors of lands in the said township of *Bickton*, reciting the before mentioned articles of agreement of the 9th *July*, A. D. 1767, and the award of 27th *June*, A. D. 1768, and that the commissioners did allot the lands and set out the roads thereafter mentioned, and that the said *William Smith* was then the owner of the lands allotted by the last

mentioned award to *John Hollings*, being No. 13 on the plan, and further reciting as follows :—

“ And whereas the said several public ways or roads ascertained, set out, and appointed in and by the said award, as hereinbefore mentioned, *being very ruinous and in bad repair, and a difference or dispute having arisen* or taken place between the inhabitants in general of the parish of *St. Chad*, in the said county of *Salop*, in which the same roads are situate and being, and the owners and occupiers of the said several pieces or parcels of land inclosed by virtue of or under the said recited articles of agreement, whether the said last mentioned roads should be repaired and kept in repair by and at the expense of the said parish in general, or by such last mentioned owners and occupiers in exclusion of the rest of the parishioners of the same parish, it was agreed by and between the parties *interested therein, that the said difference or dispute should be left to the determination of *Thomas Plumer*, of *Lincoln's Inn*, Esquire, and *Hugh Leycester*, of the same place, Esquire, and that their opinion and determination in the premises should be final and conclusive. And whereas by a certain instrument in writing under the hands of the said *Thomas Plumer* and *Hugh Leycester*, bearing date the 12th day of *August*, A. D. 1794, they, the said *Thomas Plumer* and *Hugh Leycester*, declared themselves to be of opinion that the said parish of *St. Chad* was not bound to repair the roads in question, the proprietors of the enclosed lands being liable to repair the same according to the proportions mentioned in the said award. And they directed that the roads in question should be divided by the said *John Hall* into distinct parts, corresponding to the proportions above mentioned, having regard to the condition of the said parts and the expenses of repairing the same, and the convenience of the several proprietors, which said several

parts should at all times thereafter be separately repaired by the respective proprietors, and *that separate indictments should be presented against each proprietor*, describing accurately the part which the proprietor was to repair, and the lands in respect of which he was liable to repair the same, to which indictments the said several proprietors should plead guilty, and should execute an award, to be thereafter more accurately drawn up by the said *Thomas Plumer* and *Hugh Leicester*, to ascertain the part of the road which each proprietor was thereafter to repair for ever."

It was witnessed that for carrying into effect the said award, and for other good causes and considerations then moving, they the said *John Mytton*, *William Smith* and *416] others, did, for themselves, their *respective heirs, executors, and administrators, mutually covenant and agree with each other as thereafter mentioned.

And the said *William Smith*, for himself, his heirs, executors, and administrators, did covenant, promise, and agree that he, his heirs and assigns, or the owner or occupiers for the time being of the piece or parcel of land allotted to the said *John Hollings*, (being the piece of land called the *Saw-pit Field* aforesaid), should and would, from time to time and at all times thereafter, repair and keep in good order and repair certain portions of the road, which were proved to be the part of the highway mentioned in the indictment.

The case was submitted to the jury, who were directed to consider whether the highway was an ancient public highway; whether the usage in respect of which the defendant was charged had been proved; whether the defendant was the occupier of the *Saw-pit Field* at the time mentioned in the indictment, and whether the highway was, at such last mentioned time, out of repair?

The jury found the defendant guilty.

It having been contended on the part of the defendant,

by his Counsel, that the documentary evidence produced on his behalf had disproved the usage mentioned in the indictment, and the Counsel for the prosecutor having contended that, notwithstanding such documentary evidence, such usage was established by the conviction of the said *William Smith* and the subsequent repairs by the occupiers of the land owned and held by the defendant;

The Court, in its discretion, deemed it right to reserve the question of law for the consideration of her Majesty's Justices and Barons of the Courts at *Westminster*, viz:—

*Whether upon the evidence hereinbefore set forth on the part of the prosecution of the conviction of *William Smith*, the former occupier of the lands in question, called the *Saw-pit Field*, and of the repairs of the road indicted, by the said *William Smith*, and other occupiers of the land, and the evidence on the part of the defendant of the award of the 27th *June*, A. D. 1768, and of the articles of agreement of the 1st *June*, A. D. 1797, the usage or liability in respect of which the defendant was charged in the indictment, was established. [*417

If the Court of Appeal should be of opinion that the usage charged in the indictment was established, the conviction to be affirmed; if otherwise, reversed.

The judgment of the Court of Quarter Sessions was postponed, and the defendant entered into recognizance to appear and abide the judgment of the Court when called upon.

On the 15th *November*, A. D. 1851, this case was argued before Lord CAMPBELL C. J., MAULE J., PLATT B., TALFOURD J., and MARTIN B.

Kenealy, for the defendant.

It is alleged in the indictment that the defendant was liable to repair the highway by reason of his tenure; it

ought to have been alleged that he was liable by reason of inclosure. A liability to repair *ratione tenuræ* can only arise in the case of a charter or grant from the Crown, or by prescription: here there is no charter or grant from the Crown. *R. v. Stoughton*, 1 Saund. 160.

MAULE J.—Where is there any proof, in the case sent to us, of the defendant's liability *ratione clausuræ*?

Kenealy referred to the articles of agreement of 1767 for the inclosure of *Bickton Heath*.

*418] *Lord CAMPBELL C. J.—There is no liability shewn to repair *ratione clausuræ*. It is not competent for you now to enter in that question.

Kenealy. Then it is submitted that there is no proof of an immemorial liability to repair. 1 *Inst.* 115, *Burgage*, *Sect.* 170. The agreement of 1797 says it was then a disputed question whether the parish of *St. Chad* or private persons were bound to repair,—that is inconsistent with immemorial liability, *Com. Dig. Prescription*; *Rex v. Hayman*, Moo. & M. 401; *Reg. v. Beeby*, 8 L. J., N. S., M. C, 38.

Lord CAMPBELL C. J.—On the other side, they say that there was evidence to go to the jury of an immemorial liability. Is there any evidence produced by you to negative the immemorial usage?

Kenealy. The award.

Lord CAMPBELL C. J.—The question is, whether there was conclusive evidence to negative it, so that the Court should have directed the jury that the immemorial liability was negated?

Kenealy. The commissioners first ascertained, set out, and appointed the road in question. That seems to indicate the origin of the road.

Lord CAMPBELL C. J.—The word “ascertained” is inconsistent with the supposition that that was the origin of the road.

PLATT B.—The award says that the road was then “very ruinous, and threatened to be indicted;” how is that consistent with the previous non-existence of the road.

Kenealy. The road, no doubt, existed previously; but the liability to repair attaches from the award. It is not stated who was threatened to be indicted. It might have been the parish of *St. Chad*.

LORD CAMPBELL C. J.—That is strong evidence for you but is it conclusive? How does it negative the presumption raised by the prosecution of liability *ratione tenuræ*? [*419]

MAULE J.—The question is, is it consistent with this case that there was a liability to repair before the year 1768?

Scotland, for the Crown.

A clear *prima facie* case was made out by the prosecutor. As to the weight of the evidence, your Lordships will not enter into the consideration of that. The questions for this Court are, was there evidence to go to the jury to establish the defendant's liability *ratione tenuræ*; and whether there was conclusive evidence, to answer that case. Former repairs by *Smith* were proved, the conviction of *Smith*, in respect of the lands in question, was proved, and their occupation by *Blakemore* was proved. These facts made out a good *prima facie* case. To meet that, the award and agreement are relied upon by the defendant. *Smith*, with whom *Blakemore* is privy in estate, submits to a conviction, and it is laid down by Lord *Kenyon*, in *Rex v. St. Pancras*, Peake N. P. 286, that a conviction is, *inter partes*, an estoppel.

MARTIN B.—But it was ruled in *The Duchess of Kingston's case*, that a conviction when made by arrangement, is not conclusive as an estoppel.

Scotland. If the arrangement were made behind the
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back of the parties, it would, no doubt, be liable to be set aside; but here, unless the defendant can shew fraud, he is estopped.

LORD CAMPBELL C. J.—Can a party allege fraud to avoid his own act?

Scotland. It would be to take advantage of his own wrong.

MAULE.—Is it possible to say that there was
*420] *conclusive evidence to rebut the case made out by the prosecutor?

Kenealy, replied. In *Rex v. Edmonton*, 1 M. & Rob. 24, it was said by Lord *Tenterden*, that if parties had repaired under a mistaken notion of their liability, they were not to be prejudiced thereby.

MAULE J.—There there was no record of conviction.

Cur. adv. vult.

On *Tuesday*, the 27th of *January*, A. D. 1852, this case was re-argued in the Court of Exchequer, before the thirteen following Judges :—LORD CAMPBELL C. J., JERVIS C. J., POLLOCK C. B., PARKE B., ALDERSON B., PATTESON J., MAULE J., COLERIDGE J., WIGHTMAN J., CRESSWELL J., PLATT B., WILLIAMS J., and TALFOURD J.

Kenealy, for the defendant.

On the last argument the Lord Justice said, that the question was whether a *prima facie* case had been made out on the part of the prosecution; and whether the defendant had conclusively answered that case. But it is submitted that the question is, has the liability of the defendant been conclusively shewn? If the indictment had been against a parish the case would be different; for *prima facie* the parish is liable, but this is an indictment against an individual. The principal evidence to prove the defendant's liability is the record of the con-

viction of *Smith*: it is submitted that the record is not good.

PARKE B.—If you can shew that the record is a nullity, you are at liberty to do so; but if you only say that it is erroneous, it is good till it is reversed by writ of error.

Lord CAMPBELL C. J.—The record is not brought here as upon a writ of error.

PARKE B.—If you can shew from the record, *as* [421
set out in the case before the Court, that it is a nullity, it is open to you to do so.

Kenealy referred to sect. 24, 13 *Geo.* 3, c. 78.

COLERIDGE J.—The case before us does not profess to set out all the record.

Lord CAMPBELL C. J.—The record may be perfectly valid for any thing that appears here.

MAULE J.—This Court sits under the powers given to it by the stat. 11 & 12 *Vict.* c. 78. The first sect. provides that Courts of oyer and terminer, or goal delivery, or Courts of Quarter Sessions, shall have power in their discretion to reserve any question of law which may have arisen at the trial; and then the second sect. enacts that the Judge, or Commissioner, or Court of Quarter Sessions, shall state in a case, signed in the usual manner, the question or questions of law which shall have been so reserved, with the special circumstances upon which the same shall have arisen; and then the act continues, “and the said Justices and Barons, shall, thereupon, have full power and authority to hear, and finally determine the said question or questions.” The power of this Court, therefore, is limited to the question or questions of law, reserved for our consideration by the Court of Quarter Sessions.

Kenealy. The record of conviction amounts to no

more than an admission on the part of *Smith* which may be explained.

Lord CAMPBELL C. J.—But the defendant was a privy in estate with *Smith*.

Kenealy. It is submitted that there is no real proof of immemorial liability: there is an admission which is good only until it is explained. The award of 1768, and the articles of agreement of 1997 do not establish immemoriality, but rather negative it. They omit all mention *422] of any immemorial usage, and do not *allege any liability by reason of tenure. There is no admission of a pre-existing liability of any kind whatever. Then, for the first time, the Commissioners fix a liability in respect of the *Saw-pit Field*. They were not Commissioners under an act of Parliament: they do not allege that the liability arose *ratione tenuræ*. They say, in effect, we will award you a part of the common, and in consideration of that allotment, you must contribute something to the repairs of the road. This was a mere private agreement among themselves by persons having the right of common, and is inconsistent with an immemorial usage. The fact that subscriptions were raised is also inconsistent with the supposition of immemorial usage. Then it appears by the deeds that doubts existed in 1797, as to who was bound to repair, and the matter was ultimately referred to Messrs. *Plumer* and *Leycester*, lawyers of great eminence in their time. Is it consistent with a liability by reason of tenure, that the question should have been thus referred to *Plumer* and *Leycester*, or that these gentlemen should likewise have abstained from using any language confirmatory of a legal and existing liability in the answer which they gave to the parties consulting them?

Lord CAMPBELL, C. J.—Messrs. *Plumer* and *Leycester*

advised that a conviction against *Smith* would settle the question *secula seculorum*.

Kenealy. No doubt that was their view, but they do not pretend or lay down that the parties were bound to repair *ratione tenuræ*, or by immemorial usage. Then it is to be remarked, that in addition to the conviction, they recommend a further award to be prepared by Counsel. If they had been perfectly satisfied, that there was a legal liability *ratione tenuræ*, that immemoriality had been made out, why all this complicated machinery? —Why an indictment to be *followed by a further award? The agreement of 1767 was nothing but [*423 a fraud upon the public, and this Court is now called upon to substantiate the fraud. The agreement of 1767, was unauthorized by act of Parliament. A number of persons met together and parcelled out the common to the exclusion of the general public, but they had no power to do so without an act of Parliament.

Lord CAMPBELL C. J.—If all the parties having within themselves the right of the soil, and the profits *a prendre* of the common assented to the arrangement, no act of Parliament was necessary.

Kenealy. It is presumed, that by the stat. of *Merton*, it would be illegal for them to parcel out the common without an act of Parliament. No private agreement can exonerate a parish from their liability to repair. *R. v. Beeby*, 8 L. J., N. S., M. C. 38; *R. v. Scarisbrick*, 6 L. J., N. S., M. C. 103; *R. v. St. George Hanover Square*, 3 Camp. 222.

Scotland, for the Crown.

The question before the Court is, whether there was evidence to go to the jury of the prescriptive liability of the defendant?

Lord CAMPBELL C. J.—Mr. *Kenealy* does not deny that a *prima facie* case has been made out.

Scotland. Immemoriality of tenure is supposed in both the award and the agreement. The apportionment of the common was by persons who had been proprietors. The award recites that the road was then very ruinous, and threatened to be indicted, that differences existed respecting the parties bound to repair, and that it was then found that the parish was not liable. Where there has been originally an obligation in a manor to repair a highway, it is no answer for the grantee of any portion of the manor to say that he is released from liability to

*424] repair the whole;—his *liability still remains. Everything in the award and the agreement are consistent with the *prima facie* case, proved on the part of the prosecution. The award of 1768, shews that the liability by reason of tenure, in the person through whom the defendant claims, existed before, and that the road in question also existed; all which is consistent with the case for the prosecution. Therefore it is submitted, that there was abundant evidence to go to the jury of the immemorial usage, and of the defendant's liability *ratione tenuræ*. Beside, it may be a question for the Court, whether the conviction was not an *estoppel*.

PLATT B.—The question of estoppel is not stated in the case before the Court.

Scotland. The case raises the question as to the sufficiency of the evidence. The defendant is a privy in estate with *William Smith*, and he is estopped by the conviction of *Smith*, from disputing his liability to repair the highway in question. It is submitted that the conviction is an estoppel, and that privies are bound by convictions of record. This was ruled by Lord *Kenyon*, in *Rex v. St. Pancras*, Peake N. P. 286. In that case it was held that a record of conviction on an indictment against a parish for not repairing a road, was *conclusive* evidence of the liability of that parish to repair. There the prosecutors

having closed their case, the defendants produced a copy of a record of conviction in the King's Bench, on an indictment against the inhabitants of the parish of *Islington*, for not repairing the road called *Maiden Lane*, the subject of the indictment; and Lord *Kenyon* said, "This record is *conclusive* evidence against the parish of *Islington*, for by it it is found that they are liable to repair the whole road called "*Maiden Lane*." His Lordship added, "If the parish of *Islington* can shew *fraud, it will vitiate this, or any other transaction, but un- [*425 explained, this is *conclusive* evidence." (a)

ALDERSON B.—The award of 1768 was made under an agreement, not under an act of Parliament. The commissions, therefore, had no right to say that the occupiers of the lands in question were liable to repair, unless the liability had previously existed. There is abundant evidence to go to the jury of liability, *ratione tenuræ*. It may not be *conclusive* evidence; but there is abundant evidence for the jury.

Scotland. Whether or not there was evidence to go to the jury of immemorial usage, and of the defendants liability to repair the highway *ratione tenuræ*, is the real question before the Court.

Kenealy replied.

Lord CAMPBELL C. J.—I am of opinion that this conviction must be affirmed. I hope I am not influenced in

(a) Mr. *Smith*, in his elaborate note on the *Duchess of Kingston's case* (2 *Smith's Leading Cases*, ed. *Keating and Wiles*, 445), remarks on this subject, "It is submitted that the case of *Voot v. Winch*, and *Doe v. Hudart*, are by no means at variance with the doctrine of *De Grey* C. J., viz., that a judgment on the same point, between the same parties, is in pleading a bar, in evidence *conclusive*. And it is submitted, that the true meaning of this is, that it is conclusive as a plea where there is an opportunity of pleading it, but that when there is no such opportunity, then it is *conclusive as evidence*: and that *Voot v. Winch*, and *Doe v. Hudart* merely decide that a party may waive the benefit of an estoppel, and that he elects to waive it by not pleading it when he has an opportunity of doing it."

And see the remarks of *Tindal*, C. J., 4 *Bing. M. C.* 798.

forming this opinion, by the somewhat sharp attempt of the defendant to get rid of a liability, of which he had full notice when he purchased the property. The questions left to the jury by the chairman were :—Whether the highway was an ancient public highway ; whether the usage in respect of which the defendant was charged had been proved ; whether the defendant was the occupier of the *Saw-pit *Field* at the time mentioned in the *426] indictment, and whether the highway was at such last mentioned time out of repair ? No fault can be found with the manner in which the case was put to the jury ; no Judge in *Westminster Hall* could have placed the matters for their consideration more correctly before them. The jury found all these questions in the affirmative. Now can it be said that a *prima facie* case has not been established ? The conviction of *William Smith*, with whom the defendant is a privy in estate, was given in evidence, shewing that he was bound to repair the highway *ratione tenuræ* ; which was followed by a long train of evidence, establishing a strong *prima facie* case to go to the jury. If the question had been put to us, whether the conviction of *Smith* was not *conclusive* evidence by way of estoppel, I should have been strongly inclined to have answered in the affirmative, according to the case *Rex v. Inhabitants of St. Pancras*. It would have been an estoppel if pleaded, but the Crown had no opportunity of pleading it, the defendant having pleaded the general issue. If there be an opportunity of putting an estoppel on the record, and it is not embraced, it is not conclusive, but if no such opportunity of pleading the estoppel be given, it may be conclusive. But I waive that point altogether, for I think the defendant has given no answer to the case proved on the part of the prosecution. It is quite consistent with the evidence for the defence, that might have been a highway subject to an immemorial

usage in the owner of the *Saw-pit Field* to repair, and it is open to us to draw the conclusion, that the owner of that field is liable to repair it.

JERVIS C. J.—I think that the conviction is right. I do not go into the question of estoppel, as the *question seems to me to be, whether or not there [*427 was evidence to go to the jury? I think there was. Before the articles of agreement, ancient roads existed; there were questions as to the liability to repair them; the parties inquired into their rights; it was ascertained that the owners of the lands in question were liable; a presentment was preferred against *Smith*, and he acquiesced in the conviction; and subsequent repairs by him were proved. It cannot be said, therefore, that there was not evidence for the jury.

POLLOCK C. B.—I also am of opinion that the conviction was right. There is no objection to the direction of the Chairman of the Sessions to the jury. In point of law it is right. The question is, was there evidence for the jury? of which I entertain no doubt. I therefore, think it unnecessary to consider the question of estoppel.

PARKE B.—I think the conviction is right. The question is, whether there was evidence to go to the jury of the defendant's liability to repair the road *ratione tenuræ*? and I am of opinion that there was. But I go further, and I think that the conviction was an estoppel, on the authority of the case cited, and of the following cases:—*Trevain v. Lawrence*, 1 Ld. Raym. 1051; 1 Salk. 276; *Speake v. Richards*, Hobs. 206; *Magrath v. Hardy*, 4 Bing. N. C. 782; *Armstrong v. Norton*, 2 Irish L. Rep. 100. If, instead of pleading not guilty, the defendant had pleaded that he was not liable to repair *ratione tenuræ*, and the plaintiff had replied, then the conviction against *Smith* might have been pleaded; but as he pleaded the general issue, there was no opportunity of pleading the convic-

tion as an estoppel. Lord Chief Justice *Holt*, in the case of *Lord Raym.* 1051, says, "But if the defendant had pleaded *nil debet*, the plaintiff might have taken advantage of *the estoppel on the evidence, because the *428] pleadings are not brought to such a point in the case, as to give the plaintiff the opportunity of replying the estoppel." I think, therefore, that here there was not only evidence to go to the jury, but conclusive evidence.

ALDERSON B.—I think that it was the duty of the Chairman to have told the jury that the case for the prosecution was *conclusively* proved. The award was made by persons who were to ascertain and set out the road. If they set out a road without power to do so under an act of Parliament, it is rather evidence of an existing road, and of a liability to repair it *ratione tenuræ*. Both Messrs. *Plumer* and *Leycester* find that the parish was *not* liable, which must be wrong if the road were a new one, but which is right if there was an obligation to repair the road *ratione tenuræ*. There was nothing in the defendant's evidence to negative the evidence for the prosecution. I therefore think that the conviction was right. I also agree with my Brother PARKE that the conviction was an estoppel.

PATTESON J.—I entertain no doubt that the verdict must be supported. There was abundant evidence to go to the jury. The defendant took the land under notice of liability, there having been a conviction against *Smith*. I think, also, that the conviction was an estoppel. It is evident, that the highway which was set out by the commissioners was not a new road, but one that had existed long before, which the landlord was bound to repair, and the award of Mr. *Plumer* and Mr. *Leycester* proves the same thing.

COLERIDGE J.—I also think that the conviction is right.

The questions for the Court are, whether the verdict *may* be right, and whether there was evidence for the jury? I also am of opinion that on the pleadings, as they stood, the conviction was an estoppel.

*MAULE J., WIGHTMAN J., and CRESSWELL J. [*429
concurred.

PLATT B.—I do not concur in the opinion that we ought to translate cases submitted to this Court, so as to avoid difficulties which may be raised by the questions proposed to us. The question which we are asked by the Court of Quarter Sessions is, whether the immemorial usage, in respect of which the defendant's liability arises, was *established*? If the question left to us were, whether there was evidence to go to the jury, that would have been a different question; but the liability of the defendant to repair the highway is the question. That an ancient road existed there is no doubt; but the articles of agreement set out in the case, and relied upon on the part of the Crown, could not create a liability *ratione tenuræ*. We are asked was the usage established? But if we can trace the origin of the liability to repair the road in question, how can it be said that prescriptive liability to repair has been established? It is also said that the defendant is estopped from disputing his liability. The estoppel was not pleaded; and if there be an opportunity of pleading an estoppel, and the party does not plead it, he cannot claim the advantage of it. Nor was the estoppel set up or relied upon at the trial. It was there abandoned. The facts of the whole case were gone into, and I think it is now too late to raise the question of estoppel; which question has not been left by the Court of Quarter Sessions for our consideration. It seems to me that there is not sufficient evidence to establish conclusively, the defendant's prescriptive lia-

bility, but I do not for a moment doubt that there was evidence to go to the jury.

WILLIAMS J. and TALFOURD J., concurred with the majority of the Judges.

 *The present part contains all the Crown Cases Reserved, argued and decided up to this date, together with Crown Cases determined in the Queen's Bench and Courts of Error, which will, in future, be included in this series of Reports.*

R. R. P.

TEMPLE,
June 26, 1852.

*430] *REGINA v. WILLIAM BALDRY.

A police constable, who apprehended a man on a charge of murder, having told him the nature of the charge against him, said "he need not say any thing to criminate himself: what he did say would be taken down, and used as evidence against him." The prisoner, thereupon, made a confession: *Held*, that the confession was rightly admitted in evidence.

Note.—*Rex v. Drew*, 8 Car. & P. 140; *Rex v. Morton*, 2 Moo. & Rob. 514; *Reg. v. Farlay*, 1 Cox, 76, and *Reg. v. Harris*, ib. 106, are overruled.

At the Spring Assizes for the county of *Suffolk*, the prisoner was tried before Lord CAMPBELL C. J., upon an indictment charging him with having administered poison to his wife with intent to murder her.

On the part of the prosecution a police constable was called whose evidence thus began; "I went to the prisoner's house on the 17th *December*. I saw the prisoner. Dr. *Vincent*, and *Puge*, another constable, were with me. I told him what he was charged with. He made no

reply, and sat with his face buried in his handkerchief. I believe he was crying. I said *he need not say anything to criminate himself, what he did say would be taken down and used as evidence against him.*"

Objection was made on behalf of the prisoner that what he then said was not admissible.

The Lord Chief Justice thought that although the caution of the *constable* differed from that directed by 11 & 12 *Vict. c. 42, s. 18*, to be given by the justice to the prisoner in the word "will" instead of "may," it did not amount to any promise or threat to induce the prisoner to confess; that it could have no tendency to induce him to say anything untrue; and that in spite of it if he did afterwards confess, the confession must be considered voluntary; his Lordship therefore allowed the witness to give in evidence what the prisoner then said, which amounted to a confession of his guilt.

But as doubts had been entertained by learned Judges whether a confession, after such a caution, might
*lawfully be given in evidence, his Lordship re- [*431
served the question for the Court of Criminal Appeal.

The prisoner was convicted, and sentence of death was passed upon him.

On the 24th *April*, A. D. 1852, this case was argued before Lord CAMPBELL C. J., POLLOCK C. B., PARKE B., ERLE J., and WILLIAMS J.

H. Mills, for the prisoner.

It is proposed, on behalf of the prisoner, to substantiate the objection raised at the trial; and the question is, whether the words addressed by the constable to the prisoner held out to him the promise or assurance of any worldly advantage to himself, in regard to the charge, as the consequence of making a statement, or a threat of harm to himself as the consequence of refraining from

doing so; if so, a confession made on the strength of these words, would be inadmissible in evidence.

LORD CAMPBELL C. J.—That is the question.

Mills. If made in consequence of such an inducement, it may be a false charge, made by the prisoner against himself, and unworthy of judicial notice. It is said in 2 *Russell on Crimes*, 826, that a confession, in order to be admissible, must be “free and voluntary;” that is, it must not be extracted by *any sort* of threat or violence, nor obtained by *any* direct or implied promises, however slight, nor by the exertion of any improper influence. The ground on which it is supposed to be unworthy of credit is stated by *Eyre C. J.*, *Warickshall's case*, 1 Leach, C. C. 263. There is another proposition also laid down in *Russell*. “The law cannot measure the force of the influence used, or decide upon its effect upon the mind of the prisoner, and therefore, excludes the declaration if *any* degree of influence has been exerted.” It is *432] gathered from *this that if any inducement—of the slightest description—whereby any worldly advantage to himself as a consequence of making a statement, be held out to a prisoner, the law presumes the statement to be untrue.

POLLOCK C. B.—You are overstating it. The law does not presume that it is untrue; but rather that it is uncertain whether a statement so made is true.

LORD CAMPBELL C. J.—I doubt whether the rule excluding confessions made in consequence of an inducement held out, proceeds upon the presumption that the confession is untrue; but rather that it would be dangerous to receive such evidence, and that for the due administration of justice it is better that it should be withdrawn from the consideration of the jury.

Mills. The law assumes that a man may falsely accuse himself upon the slightest inducement. In *Cass's*

case, 1 Leach, C. C. 293, note (a), a confession induced by saying, "I am in great distress about my irons; if you will tell me where they are, I will be favourable to you," was held by *Gould J.* to be inadmissible. The slightest hope of mercy to induce a prisoner to disclose is enough to render the statement inadmissible; *Rex v. Thomas*, 6 Car. & P. 353, a case before *Patteson J.* So also in a case of murder before the same learned Judge, *Sherrington's case*, 2 Lewin, C. C. 123, where the words were "No doubt thou wilt be found guilty, it will be better for you if you will confess," the confession was excluded. In another case of murder, *Rex v. Enoch and Mary Pulley*, 5 Car. & P. 539, the words "You had better tell the truth, or it will lie upon you and the man go free," were held to be such an inducement as excluded the confession.

POLLOCK C. B.—There is no doubt as to the application of the rule in those cases, which are all familiar to the Judges and to the Bar.

**Mills*. They are cited for the purpose of showing how the whole law is imbued with the pro- [*433 position that any inducement will exclude a confession. The law will not measure the force of the inducement; and the law supposes that there are circumstances in which a man will make a false accusation against himself. In the case of *Reg. v. Garner*, 18 L. J., N. C. 1; 2 Car. & K. 920,(a) the words, "it will be better to speak the truth," were held to operate in exclusion of the confession. The law says, that if any person (being a person of authority,) holds out any thing in the nature of an inducement to a prisoner, it will not permit what he has said under the influence of it, to be given in evidence. In the case of *Rex v. Parratt*, 4 Car. & P. 570, the prisoner's confession was excluded in consequence of

(a) 1 Den. C. C. 329.

the following threat, "That unfortunate watch has been found, and if you do not tell me who your partner was, I will commit you to prison as soon as we get to Newcastle;—you are a damned villain, and the gallows is painted in your face." There is also a MS. case, 2 *Russell on Crimes*, 832,(a) where the prisoner being in custody on a charge of arson, was told "that he ought to tell whatever was the truth, but he must be very careful as he was sure to be committed," on which he made a statement. *Taunton* J. doubted whether the words used might not be construed as a threat, and having consulted *Littledale* J. said, "We think, as the words were so ambiguous, that they might be considered by the prisoner as a threat, the evidence ought not to be given." Even impressing a man with the fact that the prosecutors are sure of his guilt, and alarming him so as to make him throw himself on their unpromised mercy, is sufficient to exclude a confession. In the case of *Rex v. Mills*, *434] *6 Car. & P. 146, *Gurney* B. held that the words "it is of no use for you to deny it, for there is a man and a boy will swear they saw you do it," rendered the prisoner's statement inadmissible. There is also a case before *PARKE* B., *Reg. v. Warringham*, 15 Jur. 318, where the words "it is of no use for you to deny it," were held to exclude the confession; but the answers of the witness were confused and contradictory as to whether this language was used by him before or after the confession.

PARKE B.—I have sent for my notes of that case.(b)

Mills. The law is suspicious in the highest degree of confessions; it suspects that it does not get at the truth as to the way in which they are obtained. It is remarked by *Blackstone*, 4 Bla. Com. 357, even in cases of felony,

(a) *Rex v. Williams*, *Gloucester* Spr. Ass. 1832.

(b) See *post*, 440.

at the common law they are the weakest and most suspicious of all testimony; ever liable to be obtained by artifice, false hopes, promises of favour, or menaces; seldom remembered accurately, or reported with due precision; and incapable in their nature, of being disproved by other negative evidence. The law, therefore, distrusts confessions in criminal cases. As to the practice in early times the law is barren of authorities, and little is known of it except by tradition. Lord *Coke* says nothing upon the subject, and the earliest reference to principle in regard to the receivability in evidence of confessions is, to a case in *Hardress' Rep.* 139, referred to in *Gilbert Ev.* 123,(a) where it is said to be contrary to natural justice for a man to be obliged to accuse himself; and the law on the subject seems to be none other than the application of the maxim *nemo tenetur prodere seipsum*. The law does not suppose a man to be guilty till he is proved to be so. Presuming, therefore, that *a prisoner is innocent, it imputes to a man that he being inno- [*435 cent, may, on an inducement, accuse himself falsely; and it says, that if a constable, or a person of authority, holds out to a prisoner any circumstance of worldly advantage to himself, as the consequence of making a confession, or of harm in not making it, a confession so made shall not be received in evidence.

Lord CAMPBELL C. J.—“*You need not say anything to criminate yourself, but what you do say will be taken down and used as evidence against you.*”—Do these words import a promise or threat?

Mills. Sure these words may be construed into a threat.

Lord CAMPBELL C. J.—Here there is no advantage held out to him; and there is no harm threatened if the prisoner

(a) See *Sedgwick's* Edition.

holds his tongue. You do not bring the facts within your canon.

Mills. If you shew a prisoner that you entertain a strong conviction of his guilt you disarm him, and what you say may induce him falsely to accuse himself. What is the inference that an accused person draws from your conduct that if he does not confess the prosecution will be angry?

POLLOCK C. B.—If the constable had said it may, or may not be used for or against you, then the caution would have been free from objection?

Lord CAMPBELL C. J.—That is the form prescribed by the act of Parliament to be employed by magistrates. (a)

*436] *Mills.* It amounts to this;—you say to the prisoner your case is bad, that you cannot, if you

(a) 11 & 12 Vict. c. 42, s. 18. And be it enacted, that after the examinations of all the witnesses on the part of the prosecution as aforesaid shall have been completed, the justice of the peace or one of the justices by or before whom such examination shall have been so completed as aforesaid shall, without requiring the attendance of witnesses, read or cause to be read to the accused the depositions taken against him, and shall say to him these words, or words to the like effect: "*Having heard the evidence, do you wish to say anything in answer to the charge? you are not obliged to say anything unless you desire to do so, but whatever you say will be taken down in writing, and may be given in evidence against you upon your trial;*" and whatever the prisoner shall then say in answer thereto shall be taken down in writing, and read over to him, and shall be signed by the said justice or justices, and kept with the depositions of the witnesses, and shall be transmitted with them as hereinafter mentioned; and afterwards upon the trial of the said accused person the same may, if necessary, be given in evidence against him, without further proof thereof, unless it shall be proved that the justice or justices purporting to sign the same did not in fact sign the same: *Provided always, that the said justice or justices before such accused person shall make any statement shall state to him, and give him clearly to understand, that he has nothing to hope from any promise of favour, and nothing to fear from any threat which may have been holden out to him to induce him to make any admission or confession of his guilt, but that whatever he shall then say may be given in evidence against him upon his trial, notwithstanding such promise or threat:* Provided nevertheless, that nothing herein enacted or contained shall prevent the prosecutor in any case from giving in evidence any admission or confession or other statement of the person accused or charged, made at any time, which by law would be admissible as evidence against such person.

As to the second caution, see *Reg. v. Sansome*, 1 Den. C. C. 545.

speaking the truth, deny it; in other words, if you speak the truth you must confess. Therefore, according to the old cases, it is inadmissible. If it be a natural feeling that when a man is accused of a crime and he knows that suspicion rests upon him, and that he will not be believed if he directly denies his guilt, to make a statement by way of confession and avoidance, this case is within the rule.

LORD CAMPBELL C. J.—“You need not say anything to criminate yourself”—do you contend that these words, if you were to stop there, would operate as an inducement?

Mills. No. But the whole must be taken together.

PARKE B.—What do you contend?—Do the words amount to a promise of advantage, or to a threat?

Mills. That the words import an advantage.

*PARKE B.—What is the advantage?

Mills. “Whatever you say will be given in [*437 evidence.”

POLLOCK C. B.—No: not “*whatever you say*,”—but “*what you do say*.” If the word “whatever” had been employed it might have been different.

Mills. I was under the impression that the constable had used the word “whatever;” but it is not so. That word might have made the matter more pointed, but its omission does not make any material difference. The words amount to an absolute promise that the confession will be used in evidence amongst the other evidence brought by the prosecution: they are not to be considered as a threat. In their proper signification, taken in their plain and literal sense, and, construed in the only way in which they can be construed without reading them as a threat or as involving an absurdity, they hold out an assurance of advantage to the prisoner in regard to the charge, which renders the statement made on the strength

of them inadmissible in evidence. They mean, what you say will be taken down and used as evidence against you, "as" that is to say, *in like manner as*, evidence against a prisoner; in other words, they will be used at the trial. It cannot be that the prisoner's statement would necessarily be something the effect of which would criminate him, and so be evidence against him; his statement might have been a detailed exoneration of himself. The words are certain in telling the prisoner that his statement would be used, and he is entitled, not only by a favour due to him by law on the occasion, but also according to the rational interpretation of the words, to have "as evidence against him" construed to mean "*in like manner as*;" for otherwise the words, if not a threat, import an absurdity. The accused man sat with his face *438] in his handkerchief weeping, when the words were addressed to him; he had showed no intention of speaking; his situation was one to invite pity; and the words "as evidence against" were prefaced with words of comfort. He was told, "you need not say anything to criminate yourself." In effect he was told, "speak if you like, nor need you criminate yourself; what you like to say however, shall be used at your trial; be warned therefore to say nothing against yourself." In *Rex v. Drew*, 8 Car. & P. 140, the prisoner was told "not to say anything to prejudice himself, as what he said would be taken down, and would be used for or against him at his trial." COLERIDGE J. held this to be an inducement, and that the prisoner's statement could not be received in evidence; nor is this to be considered as a hasty decision. In *Reg. v. Morton*, 2 Moo. & Rob. 514, the prisoner was told by the constable who apprehended him, "What you are charged with is a very heavy offence, and you must be very careful in making any statement to me or any body else that may tend to injure you; but

anything that you can say in your defence we shall be ready to hear, or to send to assist you." COLERIDGE J. excluded this statement, which was made in consequence of this address. He said, "Upon reflection, I adhere to my decision in *Rex v. Drew*. If the latter words had stood alone, a confession obtained by them would be clearly inadmissible; they are likely to produce an improper effect on his mind. Before such evidence can be received it must be seen that the prisoner's mind is free from any false hope or fear that would be likely to operate upon it and induce him to state that which is not true. If any such influence has been used, both the hope and the fear must be removed by a proper caution before the prisoner's statement can be received. In *Drew's case* the prisoner was told that what he said *would be used for him. Is not that creating a hope that if he told his story, whether true or false, it might benefit him. The caution that comes after does not take away the objection created by a promise in his favour; because it is impossible to say that the caution so modified the influence of the promise as to leave his mind in an unprejudiced state to tell only the truth. Besides, the law will not sanction this sort of balancing the one influence with another. The prisoner's mind must be left entirely free. Approving of the decision quoted, I think this case comes altogether within the principle of it. The word "defence" necessarily conveying to the prisoner's mind that what he said would be for his benefit, the hope is created and remains. As to what has been said about the effect of this decision being to exclude everything said before the magistrates, I altogether differ from it. It is the duty of a magistrate to give the prisoner the opportunity of saying what he chooses; whether for or against himself, provided no improper influence be used. But when a man interferes

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who has no such duty, and uses language tending improperly to influence the prisoner's mind, the statement cannot be received." This decision is perfectly rational, and warrants as in that case, so in this, that the caution given to the prisoner may be read as if the words "against you" had not occurred in it; if constables and others will inform prisoners of the consequences of making a statement, it is only just to require that they should do so correctly, and not to hold out to them unfounded hopes of advantage from making statements. Another decision on this point is *Reg. v. Mary Farley*, 1 Cox, 76. There the prisoner was told by a policeman, whatever she told him would be used against her on her trial. MAULE J. decided this case on the authority of *Rex v. Drew*, holding that to assure the prisoner that *440] "whatever she said would be used at her trial, was holding out to her an advantage which rendered her statement inadmissible. He said, where any caution at all is given, the proper course is to let the prisoner know what he says may do him harm, but cannot possibly do him good. His words also are, "If you promise a person that what he states will at all events be used at the trial, you may be thereby inducing him to confess."

PARKE B.—In consequence of the strong opinion entertained by MAULE J. upon the question, I reserved a case at *Aylesbury*; but there the prisoner was acquitted.

Lord CAMPBELL C. J.—It was in consequence of the decisions of my Brother COLERIDGE and my Brother MAULE, and of a statement that my Brother PARKE had reserved the point, that I reserved this question.

Mills. The miserable advantage of having made a confession at any early stage, in the hope that he would derive some benefit or degree of mercy from having made it, may operate upon the mind of a prisoner; and you

have no business to trap a man into a confession. There is another case decided by MAULE J., *Reg. v. Harris*, 1 Cox, 206, where the prisoner was cautioned as in the case of *Reg. v. Farley*, and where the confession was likewise excluded.

PARKE B.—On referring to my notes of *Reg. v. Warringham*, (a) I find that the words there used were “it would be best for him if he would tell how it was transacted.” The object of the report in the *Jurist* was to show, that where an inducement has been held out, it is incumbent on the prosecution to show affirmatively whether the inducement was made before or after the confession.

Mills. That undoubtedly was the object of the report *and your Lordship’s correction renders the [*441 case inapplicable to this argument. It was remarked by the Court in a case at the *Old Bailey*, 1783, 1 Leach C. C. 291, “too great a chastity cannot be preserved on this subject,” referring to the confessions of prisoners; and *Wilde* C. J., in another case rejected evidence, because it had been obtained in answer to questions put to the prisoner.

Lord CAMPBELL C. J.—Prisoners are not to be interrogated. By the law of Scotland they may be; but by the law of England they cannot.

Mills. In the case of *Rex v. Green*, 5 C. & P. 312, it was remarked by *Gurney* B., that it was proper to caution the prisoner that any confession he made would be admissible against him at the trial, and could do him no service, and in *Rex v. Arnold*, 8 Car. & P. 622, Lord *Denman* lays down the proper caution to be used by magistrates, which seemed framed to prevent prisoners from supposing that they shall necessarily have what

(a) See *post*, p. 447.

they may say adduced at the trial; the object of 11 & 12 *Vict.* c. 18, was to sanction the rule as laid down by Lord *Denman*, and it is to be noted that the statute uses the word "may" instead of "will."

Power and *Newton*, for the Crown, were not called on to address the Court.

POLLOCK C. B. (a)—I am of opinion that the conviction is right—that the evidence was properly received. I consider that the grounds for not receiving such evidence, are not those stated by the learned Counsel in his elaborate and able argument from a review of all the cases, that there is a presumption of law one way or other.

*442] The ground for not receiving such *evidence is that it would not be safe to receive a statement made under any influence or fear. There is no presumption of law that it is false or that the law considers such statement cannot be relied upon; but such confessions are rejected because it is supposed that it would be dangerous to leave such evidence to the jury. A simple caution to the accused to *tell the truth*, if he says anything, it has been decided not to be sufficient to prevent the statement made being given in evidence; and although it may be put that when a person is told to tell *the truth*, he may possibly understand that the only thing true is that he is guilty, that is not what he ought to understand. He is reminded that he need not say anything, but if he says anything let it be true. It has been decided that that would not prevent the statement being received in evidence by *Littledale J.*, in the case of *Rex v. Court*, 7 Car. & P. 486, and by *Rolfe B.*, in a case at *Gloucester*, *R. v. Holmes*, 1 Car. & K. 248; but where the admonition to speak the truth has been coupled with any expression

(a) Lord CAMPBELL C. J. intimated, that as he had reserved the case for the consideration of the Court, he should prefer hearing the judgment of the other Judges before expressing his opinion.

importing that it would *be better* for him to do so, it has been held that the confession was not receivable,—the objectionable words being that *it would be better* to speak the truth, because they import that it would be better for him to say something. This was decided in the case of *Reg. v. Garner*, 1 Den. C. C. 329. The true distinction between the present case and a case of that kind is, that it is left to the prisoner a matter of perfect indifference whether he should open his mouth or not. With regard to the cases of *Reg. v. Drew* and *Reg. v. Morton*, with the greatest respect for my Brother COLERIDGE, I do not approve of the decision in the former or of the arguments used to uphold it in the latter. I think the statement made by the prisoner in *Reg. v. Drew* ought not to have been rejected. He was told “that what he said *would be taken down and would be used for him, or against him at the trial.” The whole effect of [*443 the sentence was, that the man was told that whatever he said would be taken down and used as evidence in the cause,—that is, the truth would be stated on the trial. I first heard of the opinion of my Brother MAULE in 1845, and I required it to be vouched either by print or a manuscript note that there had been such a decision. With every veneration for the opinions of my Brother MAULE, I cannot agree with his view on this subject, and I have myself decided the other way, offering to reserve a case for the consideration of the Judges. The question now is, whether the words employed by the constable “*he need not say anything to criminate himself; what he did say would be taken down and used as evidence against him,*” amount either to a promise or a threat? We are not to torture this expression, or to say whether a man might have misunderstood their meaning, for the words of the statute might by ingenuity be suggested to raise in the mind of the prisoner very different ideas from that

which is the natural meaning. The words are to be taken in their obvious meaning. It is very important for the protection of innocence that any man charged with a crime should be told at the time of his apprehension what that charge is. Attention should be paid to any communication made by him at that time, because generally a prisoner has no means of paying for witnesses. The accused may frequently be in a situation at once to say that he was in such a place and could prove an *alibi*, and may be able to make some statement of extreme importance, in order to show that he did not commit the crime, or was not the person intended to be charged. In criminal trials I make a point of inquiring whether the prisoner made a statement on being first *444] taken into custody, and I have known *repeatedly an acquittal occur chiefly on the grounds of what the prisoner stated at the time of his apprehension. It is proper that a prisoner should be cautioned not to criminate himself; but I think that what he says ought to be adduced either as evidence of his guilt, or as evidence in his favour. For these reasons, I think that the Lord Chief Justice properly received the confession at the trial.

PARKE B.—I entirely agree with the Lord Chief Baron and with the view taken by Lord CAMPBELL at the trial. The prisoner was tried upon an indictment charging him with having administered poison to his wife with intent to murder her. On the part of the prosecution a police constable was called, whose evidence thus began: "I went to the prisoner's house on the 17th *December*. I saw the prisoner. Dr. *Vincent*, and *Page*, another constable, were with me. I told him what he was charged with; he made no reply, and sat with his face buried in his handkerchief. I believe he was crying. I said *he need not say anything to criminate himself, what he did say*

would be taken down and used as evidence against him." Objection was made on behalf of the prisoner that what he then said was not admissible. His Lordship thought that the words of the statute were merely a direction, and that although the caution of the constable differed from that directed by 11 & 12 *Vict.* c. 42, s. 18, to be given by the justice to the prisoner in the word "will" instead of "may," it did not amount to any promise or threat to induce the prisoner to confess; that it could have no tendency to induce him to say anything untrue; and that in spite of it, if he did afterwards confess, the confession must be considered voluntary. In that I entirely concur, and I think that the reasons given by the Lord Chief Justice are satisfactory. By the law of *England*, in order to render a confession [*445 admissible in evidence it must be perfectly voluntary; and there is no doubt that any inducement in the nature of a promise or of a threat held out by a person in authority, vitiates a confession. The decisions to that effect have gone a long way; whether it would not have been better to have allowed the whole to go to the jury, it is now too late to inquire, but I think there has been too much tenderness towards prisoners in this matter. I confess that I cannot look at the decisions without some shame when I consider what objections have prevailed to prevent the reception of confessions in evidence; and I agree with the observation of Mr. *Pitt Taylor*, that the rule has been extended quite too far, and that justice and common sense have, too frequently, been sacrificed at the shrine of mercy. We all know how it occurred. Every Judge decided by himself upon the admissibility of the confession, and he did not like to press against the prisoner, and took the merciful view of it. If the question were *res nova* I cannot see how it could be argued that any advantage is offered to a prisoner by his being told

that what he says will be used in evidence against him. I have the most unfeigned respect for COLERIDGE J. and MAULE J., and in deference to their decisions, I offered to reserve a case at *Aylesbury*, but I cannot concur in their judgment. I have reflected on *Reg. v. Drew* and *Reg. v. Morton*, and I have never been able to make out that any benefit was held out to the prisoner by the caution employed in those cases. We ought therefore to be extremely obliged to Lord CAMPBELL for having reserved the point in order that it might be settled.

ERLE J.—I think that the statement of the prisoner was properly received. In my opinion the best defence of innocence is founded on the statement which he is shown to have used when first accused; and I *446] *am of opinion that when a confession is well proved it is the best evidence that can be produced; and that unless it be clear that there was either a threat, or a promise to induce it, it ought not to be excluded. I am much inclined to agree with Mr. *Pitt Taylor*; and according to my judgment, in many cases where confessions have been excluded, justice and common sense have been sacrificed, not at the shrine of mercy, but at the shrine of *guilt*. The words "*will*" or "*may*," as used in the caution are, in effect, the same; one being absolute, the other contingent. In the able argument that has been addressed to us, it has been contended that the assurance that the statement *will* be used, promises an advantage, and should therefore exclude the confession; whilst it is admitted that this supposed advantage promised contingently does not exclude it. But if it be an advantage when promised positively, it is also a promise of advantage when made contingently, and if it does not exclude in one, neither ought it in the other.

WILLIAMS J.—I am entirely of the same opinion. What was said to the prisoner was nothing more than

that what he said would not be kept secret, but would be used in evidence; and it is an over-refinement to say that a statement made after such a caution was inadmissible.

Lord CAMPBELL C. J.—I adhere to the opinion which I formed at the trial. The rule, I take to be as Mr. *Mills* has stated it, that if there be any worldly advantage held out, or any harm threatened, the confession must be excluded. The reason is, not that the law supposes that the statement will be false, but that the prisoner has made the confession under a bias, and that, therefore, it would be better not to submit it to the jury. If the matter were *res integra* I should perhaps have doubted whether it might not *have been [447 advisable to allow the confession to be given in evidence, and let the jury give what weight to it they pleased; but I do not in the slightest degree intend to break in upon the rule laid down by Mr. *Mills*. With regard to the decisions of my Brother COLERIDGE and my Brother MAULE, with the greatest respect for them, I disagree with their conclusions. It was in deference to their ruling that I reserved this point, not that I entertained any doubt upon the question myself. I am very glad to find that all this Court concur in the view which I took at the trial, that the evidence was admissible.

Note.—The subjoined case, referred to in the argument of the foregoing case, deciding an important point of evidence is here inserted in a corrected form. The evidence is taken from the MS. Notes of Baron PARKER, who has kindly permitted the Editor to use them, and is included within brackets; the argument stands as in the original report:—

REGINA v. HENRY WARRINGHAM.

Coram PARKER B. Surrey Spring Assizes, 1851.

1. In order to render a confession by a prisoner admissible the prosecution must shew affirmatively, to the satisfaction of the Judge, that it has not been made under the influence of an improper inducement: if this appear doubtful on the evidence the confession ought to be rejected.

2. On an indictment for stealing the goods of two persons in partnership, a confession made after an inducement to confess has been held out in their absence by the wife of one of them, who assisted in the management of their business, is inadmissible.

The prisoner was indicted for stealing a quantity of brown duck, the property of two persons, carrying on business in partnership, in whose shop he served. The first witness was one of the prosecutors :

[*Luke Blakemore.* Waterproof clothes manufacturer in *Tooley Street*. My brother is in partnership. Prisoner was in my employ 24th *January*. In evening he had charge of the goods in the shop. On the 11th *March* I missed a piece of duck, thirty-six yards in length, worth 14s. (it was taken 25th *February*.) I accused prisoner and he made no answer. I went to the station-house; I heard something then spoke to prisoner again. I said, *it is of no use to deny*; I have seen the piece of goods at the station-house. He said, he would not have done it, if he had not been persuaded to it. I told him, *it would be best for him*, if he would tell how it was transacted—this not till some time after. I did not say I would not prosecute him; I did not say he should not lose his situation. My brother was present, he did not say anything.

Cross-examined. I have not been in *Horsemonger Gaol*; never in any prison : never had a key turned on me *for a day*. I was taken to a police station for selling cherries—a *night*. It was because I would not move on. I got out at twelve; I was let off. I decline to answer the question as to another time. I *448] was not locked up more than twice. I was not punished. *I do not recollect what it was for;—three years ago for the cherries; the other six or seven years ago for an assault. I received no punishment. I don't know what kind of assault. Prisoner had been in my employ two months. Brother is not here, I left him at our shop; brother was in this Court in the morning; he went away about eleven, but I will not swear as to the time.]

Locke, for the prisoner, objected to admissibility of the confession.

PARKER B.—It certainly does not appear that the confession was not made in consequence of an improper inducement.

W. M. Best, for the prosecution. It does not appear that the confession was made in consequence of such an inducement. If the evidence leaves that fact doubtful, the *onus* does not lie on the prosecution to prove the negative.

PARKER B.—Yes, it does. You are bound to satisfy me that the confession, which you seek to use in evidence against the prisoner, was not obtained from him by improper means. I am not satisfied of that, for it is impossible to collect from the answers of this witness whether such was the case or not.

This confession was therefore rejected. [I reject the evidence of admission, not being satisfied that it was voluntary.—MS. PARKER B.]

The wife of the other prosecutor was then examined :

[*Jane Blakemore.* Wife of brother of prosecutor. On 11th of *March* I said to prisoner, there is a piece of duck lost, do you know anything about it? He made no answer, but went out. He afterwards beckoned me, and told me, if my husband would take *William Dear* and *Bristol Jack*, he would tell all. I had said nothing to him before that, he said that night. Prosecutor and the brother had not been to station and returned; they were absent; then the prisoner told me, that night fortnight, that *William Dear* had come to the window

and told him he was not half wide awake enough, and that if he could get him a piece of duck he would put it away for him, and that he, after hesitating, said he would, and that *William Dear*, *Jos. Gillen*, and *Bristol Jack* would be at turning nearly right opposite, and *William Dear* was to whistle, and *Warringham* was to turn his back, and *Jos. Gillen* was to come in and take the duck away; and that prisoner did so, and put duck in the corner, and turned his face when *William Dear* whistled, and that all the three took it, and *Gillen* carried it. I did not tell. I told prisoner I would not tell until he told himself. I did not tell prosecutor till prisoner told me something.

Cross-examined. Prosecutor is married. I do not answer as to having been in any trouble. "Were you in prison?" I am not bound to answer that. I have been married four years the 22d of last *August*. I was working in a manufactory. I was living with my mother eleven montha. I was working at Mr. *Wilson's*. I did not tell prisoner if he told me I would not tell. I told him, perhaps it would be better for him, if he would tell them how we had been robbed, and put us on our guard. I do occasionally take the management of the shop. I manage the shop in my brother and husband's absence, and live in the house. I stand [*449 behind the counter and serve.

PARKS B.—Is this admissible?

Best. An inducement by the prosecutor's wife renders a confession inadmissible only when it is held out in the presence of her husband. An inducement by the wife of a constable will not vitiate a confession.

PARKS B.—The wife of a constable has no control over the prisoner. This woman, being the wife of one of the prosecutors, and concerned in the management of their business, must be looked upon as a person in authority.

This confession was, therefore, likewise rejected. [I think inadmissible. *MS.* **PARKS B.**]

[*Samuel Congdon.* Prisoner was delivered to me on a charge; he said, there were others concerned as well as I. I did not speak to him before; this was on the 12th *March*.]

There being no other evidence, a verdict of *Not guilty* was returned.

See the case of *Reg. v. Hannah Moore, post*.

REGINA v. JOHN SMITH.

The prisoner took out of his pocket a piece of blank paper properly stamped with a sixpenny stamp, having led the prosecutor to believe that he was about to pay him the sum of 4*l.* 1*l.* 1*d.* due to him from one *P*. The prosecutor wrote upon the paper a receipt for the money; whereupon the prisoner took up the receipt, and left the prosecutor without paying him; and the jury found that he took it with intent to defraud: *Held*, that the prisoner could not be convicted of larceny, the prosecutor never having had such a possession of the paper as would have enabled him to maintain trespass.

At the *Epiphany* Quarter Sessions held by adjournment at *Swansea*, in the county of *Glamorgan*, on the 9th *January*, 1852, the prisoner, *John Smith*, was indicted before *H. A. Bruce*, Esq., and other Justices of the same county, for having, on the 3rd *December*, 1851, "one piece of paper stamped with a certain stamp denoting the payment of a duty to our Sovereign Lady the Queen of sixpence of the property &c. of *Thomas Henderson* feloniously stolen, &c."

The prosecutor, *Thomas Henderson*, had been time-keeper and general clerk to *Isaac Powell*, a railway contractor, whose employment he left in *November*, 1851. The prosecutor applied frequently, and without success, to *Powell* for payment of wages due to him. On the 3rd *December*, 1851, prosecutor went to a public house where he saw *Powell* and the prisoner, who was a gauger (or *450] foreman) in the *employ of *Powell*. Prosecutor asked *Powell* if he was going to settle with him? *Powell* answered "Yes;" and said that he would send the prisoner up to his house to his (*Powell's*) wife for the money. *Powell* then left the house, and prisoner followed him. In about two minutes prisoner returned, and beckoned the prosecutor to come to him into the front parlour; prosecutor went there. They were alone, and made up between them the balance of wages due to prosecutor, which they fixed at 4*l.* 11*s.* 1½*d.* Prisoner then took out of his pocket a sixpenny stamp and put it on the table. Prosecutor took the stamp and pulled it towards himself, and asked the prisoner whether he (prosecutor) should write a receipt for the full sum of 10*l.* 16*s.*, or for the balance. Prisoner said "for the balance." While prosecutor was writing he observed the prisoner pull out a fist full of silver and turn it over in his hand. When prosecutor had written out the receipt, prisoner took it up and went out of the room. Prosecutor followed

him and said, "*Smith*, you have not given me the money." Prisoner said, "It's all right." Prosecutor repeatedly asked prisoner for the money, but in vain. On the evening of the same day prosecutor met *Powell* and the prisoner together, and asked *Powell* if he had given prisoner any money for him; *Powell* said "No; but my wife has." Prosecutor said he had not had the receipt. "Well," answered *Powell*, "he (the prisoner) would not have the receipt, if you (the prosecutor) had not had the money."

The learned Chairman told the jury, after much doubt, that if they believed the evidence, the stamped receipt was the property and was in possession of the prosecutor at and after the time of his writing the receipt; and that if they believed the prosecutor's statement, and should be of opinion that the prisoner *took the receipt out of such possession with a fraudulent intent, [*451 they might convict him of larceny.

The jury returned a verdict of guilty, and the prisoner was sentenced to imprisonment for four calendar months with hard labour.

The Counsel for the prisoner raised the following objections:—

1st. That there was not such a property and possession in the prosecutor as to support the charge laid in the indictment.

2nd. That there was no evidence of a felonious taking.

The Chairman thereupon reserved the case for the consideration of the Judges and begged their opinion thereon.

On the 24th *April*, A. D. 1852, this case was considered by POLLOCK C. B., PARKE B., ERLE J., TALFOURD J., and CROMPTON J.

Terry, for the Crown, read the case and cited *Rex v.*
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Phipoe, 2 Leach, C. C. 673. There the prosecutor was compelled by duress to sign a promissory note, which had been previously prepared by the defendant, who produced it, and withdrew it again as soon as it was signed, and a great difference of opinion existed among the Judges as to whether there was a larceny or not.

PARKE B.—The stamped paper never was in the prosecutor's possession, and the prisoner cannot be convicted of stealing it unless the prosecutor had such a possession of it as would enable him to maintain trespass. It was merely handed over for him to write upon it.

Terry. But it is found that it was obtained from the prosecutor by the prisoner with an intent to defraud.

PARKE B.—It is like the case of *Rex v. Hart*, 6 Car. & P. 106, where the prisoner was indicted for stealing *452] ing *an imperfect bill of exchange. There the prisoner produced from his pocket ten blank stamps, and the prosecutor wrote on each of them the words "payable at Messrs, *Praed* and Co., 189, *Fleet Street, London*." Nothing was written on the stamps at that time but these words; and the prisoner took the stamps away. The prosecutor saw him again several days afterwards, when he said that the prosecutor had omitted to sign his name, and he again produced the ten pieces of paper; the prosecutor signed them and wrote "accepted" on each of them, and gave them to the prisoner again. He said he would send the money in a few days by the mail, but it was never sent. *Littledale* J. observed, in giving judgment, "If a person by false representation obtains the possession of the property of another, intending to convert it to his own use, this is felony; but the property must have been previously *in the possession* of the person from whom it is charged to have been stolen. Now, I think that these papers, in the state in which they were, were *the property of the prisoner*. He took them from his pocket,

and the prosecutor never had them except for the purpose of writing upon them; they were never out of the prisoner's sight; the prosecutor writes upon them as he intended, and the prisoner immediately has them again. I think that the prisoner cannot be considered as having committed a trespass in the taking, as they were never out of his possession at all." In the same way here, the prosecutor never had the possession of the stamped paper.

Terry. In the case of *Rex v. Hart*, the articles alleged to have been stolen were imperfect bills of exchange. Here the case is somewhat different; a *receipt* for a sum of 4*l.* 10*s.* 1*d.*—a debt due to the prosecutor, is obtained from the prosecutor by fraud.

PARKE B.—But there was never any property in *the stamped paper in the prosecutor. It was [*453 never delivered to him to keep.

Terry. It is submitted that he had a property in it as a bailee?(a)

PARKE B.—No. It was never intended that he should retain it. It was merely handed to him to write upon it.

POLLOCK C. B.—Could the prosecutor have brought an action of trover for the stamped paper?

Terry. I apprehend he could.

PARKE B.—That is another question. *Littledale J.* says that he could not maintain an action of *trespass*.

The Judges were all of opinion that this was not a case of larceny, and the conviction was ordered to be quashed.

(a) As to the cases where a man may commit larceny by stealing *his own goods* from a bailee, see 4 *Bl. Com.* 231, and note by *Chitty*.

Larceny may be committed on one's own property, where the intent is to charge another with the value of it; *Palmer v. The People*, 10 *Wendell*, 165. Where the holder of a promissory note, having received a partial payment from the maker, handed it to him to endorse the payment, and he took it away and

refused to give it up, it was held, that the possession remained in the owner, and that his subsequent conversion being found to be felonious, was larceny. *The People v. Call*, 1 Denio, 120.

REGINA v. WILLIAM GREENWOOD.

The prisoner and one *J.* were indicted for a misdemeanor in uttering a counterfeit coin. The uttering was effected by *J.* in the absence of the prisoner, but the jury found that they were both engaged on the evening on which the uttering took place, in the common purpose of uttering counterfeit shillings, and that in pursuance of that common purpose *J.* uttered the coin specified in the indictment: *Held*, that the prisoner was rightly convicted as a principal, there being no accessories in misdemeanor.

Note.—*Reg. v. Elze*, Russ. & Ry. 142, and *Reg. v. Page and Jones*, 1 Russ. on Crimes, 82, are overruled.

THE prisoner *William Greenwood* and one *Johnson* were tried before TALFOURD J. at the last Assizes for the city of *Exeter*, for a misdemeanor in knowingly uttering a counterfeit shilling.

The evidence proved that the uttering charged in the indictment was effected by the prisoner *Johnson* in the *454] *absence of Greenwood*; but that both prisoners were together before the uttering, each offering counterfeit shillings of the same description with that uttered by *Johnson*; that they both brought food purchased with the proceeds of such utterings to a common lodging; and that *Greenwood* was taken on the same evening with a counterfeit shilling of the same mould in his possession and with eight good sixpences and five fourpenny pieces, which left no doubt of their joint engagement in a common purpose of uttering base shillings and sharing in the proceeds.

As to *Johnson* the case was without doubt; as to *Greenwood* the learned Judge directed the jury, that if they thought he was engaged on the evening in question with

Johnson in the common purpose of uttering counterfeit shillings—having one stock of such coin—for their mutual benefit; and if, in pursuance of such purpose, *Johnson* uttered the shilling, they ought to find *Greenwood* guilty, subject to the question of law which arose on the facts as to whether the actual presence of *Greenwood*, or so near neighbourhood as to amount to association in the very act, was necessary to support the charge.

The jury found both prisoners guilty, and his Lordship sentenced both to six months' imprisonment with hard labour; but, in deference to the authority of the case of *The King v. Else*, Russ. & R., C. C. R. 142, (a) *and the opinion of Mr. Justice COLERIDGE in *The Queen v. Page*, 1 Russ. on Crimes, 82, (b) reserved [*455 the question whether *Greenwood* was properly convicted for the judgment of the Court of Criminal Appeal.

On the 24th of *April*, A. D. 1852, this case was consi-

(a) The prisoners *Job* and *Sarah Else* were indicted for uttering a bad shilling, having other bad shillings in their possession at the time. Upon the evidence it appeared, that the uttering was by the woman alone, on the 30th of *January*, in the absence of the man; that they both slept together on the 29th and 31st; and that on the 30th the man offered for sale a large quantity of bad shillings and sixpences, and also that they were both searched on the 31st, when upon the man was found a large quantity of bad shillings, and upon the woman were found six bad shillings. The prisoners were upon this evidence both convicted of the double offence, on the ground that both being engaged in the same illegal traffic, the act of one was the act of both: but upon the case being reserved, the Judges held the woman alone liable to be convicted, and that of the single offence only. *Rex v. Else*, East. Term, 1808, Russ. & Ry. 142.

(b) *Page* and *Jones* were indicted under 2 Wm. 4, c. 34, s. 7, for uttering counterfeit half-crowns twice on the same day; and it appeared that they were seen at different times in the morning together, and that *Page* went into an inn, leaving *Jones* about twelve yards off in the street, whilst *Page* passed one half-crown in a room, which was out of sight of *Jones*. *Page* then came out, joined *Jones*, and they went together to another inn, where *Jones* went in and passed another half-crown, leaving *Page* standing about twelve yards off in the street, and out of sight where *Jones* passed the half-crown. COLERIDGE J. said, he thought the true principle was, whether the one prisoner was so near to the other as to help to get rid of the money, which he did not think the evidence proved in this case. 1 Russ. Crimes, 82.

dered by POLLOCK C. B., PARKE B., ERLE J., TALFOURD J., and CROMPTON J.

POLLOCK C. B.—We are all of opinion that the prisoners have been properly convicted. Evidence of participation was submitted to the jury, and the jury have found that the prisoners were engaged in a common purpose, and that they both were guilty.

PARKE B.—I am of the same opinion. At common law persons who, in felony, would have been accessories before the fact, in misdemeanors were treated as principals. I think, therefore, that the cases of *Rex v. Elze* and *Reg. v. Page and Jones* were wrongly decided, and the comments on those decisions in 1 *Russell on Crimes*, 82, are well worthy of consideration. (a) The distinc-

(a) The following are the remarks of the learned annotator on *Russell* referred to by PARKE B. :—

Reg. v. Page and Jones, Hereford Sp. Ass. 1841, MS. The jury convicted both. I suggested in this case that *Rex v. Elze*, had proceeded on a fallacy. It was considered in the same light as a felony, and the rule as to principal and accessory applied to it, which was erroneous, as it was a misdemeanor, and therefore all persons taking part in it were principals, though absent. The learned Judge made no direct allusion to this suggestion, which seems to me to deserve consideration; the rule is, that in misdemeanors all persons concerned therein are principals; 4 *Bl. Com.* 36; 1 *Hals.* 613; 12 *Co.* 81; *Dalt.* c. 161; 2 *Inst.* 183; *Co. Litt.* 57; *Foot.* 73; *Baker v. Rogers*, Cro. Eliz. 788; and whatever would make a person accessory in felony makes him a principal in crimes where there are no accessories. It has been so held in treason; 12 *Co.* 81; *Stamf. P. C.* 40. In all these cases of uttering the evidence would certainly have satisfied a jury, if the case had been a felony that the party absent was an accessory, and therefore it should seem that he was a principal in the misdemeanor. If that be so, the indictments charging with the actual uttering were right, because that is charging according to the legal effect of the offence. In 12 *Co.* 81, it was held, that if one, before the act done, procure another to counterfeit the great seal, in the indictment he may be charged with the fact, viz., the counterfeiting. Unless, therefore, the misdemeanor of uttering base coin is to be distinguished from all other misdemeanors, these cases deserve reconsideration; and the more so because, if they are good law, the utterer alone can be convicted, while the party in the distance, who generally is the more guilty, will altogether escape. He cannot be convicted as a principal, because he is absent, nor as accessory, because in misdemeanors there are no accessories. In *Rex v. Roderick*, 7 C. & P. 795, PARKE B. expressly declared that when an offence was made a misdemeanor by statute, it was made so for all purposes; and surely there can be no good

tion *is now abolished by statute, for by 11 & 12 [456
Vict. c. 46, an accessory before the fact whether
 the same be a felony at common law or by statute, may
 be indicted, tried, convicted, and punished in all respects
 as if he were the principal felon. (a) The only cases
 *that seem to have been referred to in *Rex v. Elze* [457
 were *Rex v. Soares*, R. & R. 25, and *Rex v. Davis*,

reason for introducing an exception, the effect of which is to give perfect impunity to guilty parties. The only cases referred to in *Rex v. Elze* were *Rex v. Soares*, R. & R., C. O. R. 25, and *Rex v. Davis*, *ibid.* 113, both cases of felony.—C. S. G.

(a) 11 & 12 *Vict.* c. 46, ss. 1, 2. Whereas the technical strictness of criminal proceedings might in some instances be further relaxed, so as to ensure the punishment of the guilty, without depriving the accused of any just means of defence: and whereas it is expedient to make further provision for the more effectual prosecution of accessories before and after the fact to felony: and whereas it is also expedient that any accessory before the fact to felony should be liable to be indicted, tried, convicted, and punished in all respects like the principal, as is now the case in treason and in all misdemeanors: be it therefore enacted by the Queen's most excellent Majesty, by and with the advice and consent of the lords spiritual and temporal, and commons, in this present Parliament assembled, and by the authority of the same, that from and after the passing of this act, if any person shall become an *accessory before the fact* to any felony, whether the same be a felony at common law or by virtue of any statute or statutes made or to be made, such person may be indicted, tried, convicted, and punished in all respects as if he were a principal felon. And whereas an *accessory after the fact* to felony can at present be tried only along with the principal felon, or after the principal felon has been convicted, and not otherwise, which is sometimes productive of a failure of justice; be it therefore enacted, that from and after the passing of this act, if any person shall become an *accessory after the fact* to any felony, whether the same be a felony at common law or by virtue of any statute or statutes made or to be made, he may be indicted and convicted either as accessory after the fact to the principal felony together with the principal felon, or after the conviction of the principal felon,—or may be indicted and convicted of a substantive felony, whether the principal felon shall or shall not have been previously convicted, or shall or shall not be amenable to justice, and may thereupon be punished in like manner as an accessory after the fact to the same felony, if convicted as an accessory, may be punished; and the offence of such person, howsoever indicted, may be inquired of, tried, determined and punished by any Court which shall have jurisdiction to try the principal felon, in the same manner as if the act by reason of which such person shall have become an accessory had been committed at the same place as the principal felony: provided always, that no person who shall be once duly tried for any such offence, whether as an accessory after the fact or as for a substantive felony, shall be liable to be again indicted or tried for the same offence.

R. & R. 118; but both those cases were felonies, and did not apply to the case of a misdemeanor.

ERLE J.—The principle is one of universal application that all participators are principals in misdemeanor.

TALFOURD J.—I should not have thought that the matter admitted of question, but for the case of *Rex v. Else* and *Reg. v. Page*; and, in consequence of those decisions, I thought it proper to reserve the point for the determination of this Court.

CROMPTON J.—The old cases were decided without a consideration of the principle, that in misdemeanor there are no accessories, and are therefore very properly overruled.

[Whatever constitutes one an accessory in a capital offence makes him liable as principal in a misdemeanor. *The State v. Westfield*, 1 Bailey, 132; *Commonwealth v. Macomber*, 3 Mass. 256; *Commonwealth v. Barlow*, 4 ibid. 440; *Whitaker v. English*, 1 Bay. 15; *Chanet v. Parker*, 1 Rep. Const. C. C. 333; *Commonwealth v. M'Attee*, 8 Dana, 28; *Williams v. The State*, 12 Smedes & Marshall, 58.]

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*REGINA v. CHICHESTER.

Where a defendant indicted for a nuisance in obstructing a navigable river, allows judgment to go by default, and is under no recognizances to appear in the Queen's Bench for judgment, the Court will not *in his absence* give judgment that the nuisance be abated, though notice has been left at his residence of the intention of the Crown to pray for judgment; the proper course being to sue out a writ of *capias* and proceed to outlawry.

THE defendant was indicted for a nuisance (a) in having erected a weir in the river *Torridge, Devonshire*, within the jurisdiction of the Admiralty. The defendant al-

(a) See *Hawk. P. C.*, Bk. 1, c. 75, s. 11, notes by *Leach*; *Noy*, 103; *Cro. C.* 390.

lowed judgment to go by default, and judgment had been entered. It appeared that notice had been left at the residence of the defendant, informing him that an application would be made to the Court, on the part of the Crown, for judgment against him, but that he had kept out of the way.

Crowder Q. C., for the Crown, appeared in the Court of Queen's Bench, *Mich.* Term, 1851, Lord CAMPBELL C. J., PATTESON J., and ERLE J. being present, and prayed the judgment of the Court.

Lord CAMPBELL C. J.—Do you ask the Court to pass sentence upon the defendant in his absence? He is in the same situation as if he had been convicted by verdict of a jury.

Crowder Q. C. The Court can, in the absence of the defendant, give judgment that the nuisance be abated. A *capias*(a) might, no doubt, issue, but where the navigation of a river is affected, it is important to avoid the delay of such proceeding.

Lord CAMPBELL C. J.—We cannot, in the *absence* of the defendant, give judgment against him, and interfere to abate the nuisance. There is no difficulty in proceeding by outlawry. In the case of a common nuisance, it might be removed in the way suggested; but the Court cannot, *ex parte*, give its judgment that this is a nuisance of this nature.

The rest of the Court concurred.

*REGINA v. PARKINSON.

[*459

In moving for a new trial where the defendant has been found guilty of a nuisance in obstructing a public sewer, and where he is liable not to personal

(a) A *capias ad satisfaciendum*. See 3 Crim. L. Rep. 159.

punishment but to a fine, it is not necessary that the defendant should be present in Court.

THE defendant had been found guilty on an indictment tried before Mr. Justice WILLIAMS, at the *Lancashire* Summer Assizes for obstructing a sewer; and in *Hil.* Term, 1851, *Watson* Q. C. moved the Court of Queen's Bench for a new trial, in the absence of the defendant, leave having been reserved by the learned Judge at the trial to enter a verdict for defendant.

PER CURIAM.—Where a defendant has been found guilty on an indictment for an obstruction to a public sewer, and is not liable to *personal punishment*, but to a fine, (a) it is not necessary that he should appear in the Queen's Bench when a motion is made for a new trial.

The Court took time to consider, and on the 12th *November* granted a rule *nisi* for a new trial.

REGINA v. HENRY PERKINS.

A principal in the second degree, *particeps criminis*, cannot at the same time be treated as a receiver.

George Perkins was indicted at the *Middlesex* Sessions, *February*, 1852, for stealing a piece of pork, the property of his master the prosecutor, and *Henry Perkins* was indicted for receiving the same knowing it to have been stolen. It appeared in evidence that on the day of

(a) See 1 *Chitty's Crim. L.* 656; 2 *Dow. & Ry.* 46. But as a general rule, when an application is made for a new trial, all the defendants convicted must be actually present in Court unless some special ground be laid for dispensing with the rule. As to the power of the Court to dispense with the presence of the defendant, see *R. v. Boltz*, 6 *Dowl. & Ry.* 65; see also *Reg. v. Caudwell*, *ante*, p. 372; and see *Bac. Abr.*, "Trial," L. 9; *Com. Dig.* "Indictment," N; *Tidd, Prac.* 945; *Rex v. Cochrane*, (*Lord*), 3 *M. & S.* 10, n.

the felony the two prisoners were seen conversing *together near the prosecutor's premises, that [*460 they went together to the warehouse [of the prosecutor (the master of *George*)] where the pork was kept; that the prisoner *George* went into the warehouse and took the pork out of a tub and brought it out of the warehouse, and gave it to the prisoner *Henry*, who had remained on the outside, and who was not in a position to see what the other prisoner did in the warehouse, but was sufficiently near to have rendered him aid, in case he had been [taken into custody, that is to say, the evidence was sufficient to have convicted him as a principal in the second degree.]

It was contended for the prisoner *Henry* that this evidence did not support the charge of receiving, and that as there was no count charging him with stealing he must be acquitted.

[The jury found the prisoner guilty; (a) and the question reserved for the Court of Appeal was whether a person who was a principal in the second degree could, under the above circumstances, be treated as a receiver of the goods stolen, and convicted of that offence.]

Judgment was passed upon the prisoner, but the execution thereof was respited, and he was committed to prison to await the decision of this case.

On the 24th *April*, A. D. 1852, this case was considered by POLLOCK C. B., PARKE B., ERLE J., TALFOURD J., and CROMPTON J.

(a) In the case as originally submitted to the Judges, the ruling of the Assistant Judge, *Adams Serjt.*, at sessions, is thus stated. "The Court was of opinion, that the theft was complete as soon as the pork was taken out of the tub, and that the act of receiving was a distinct felony, and under their direction the jury found both the prisoners guilty."

Maude, for the Crown, cited *Reg. v. Gruncell*, 9 Car. & P. 365.

*461] *PARKE B.—The question would turn on this, whether the prisoner was privy to the intent to steal. If he was a *particeps criminis*, and went near enough to be a principal in the second degree, then he could not be convicted as a receiver.

POLLOCK C. B. The finding of the jury would be perfectly right if the prisoner, *Henry Perkins*, had gone to the place for any other purpose than that of aiding the other prisoner.

The Lord Chief Baron added, that he thought it desirable that the case should be sent back for amendment; and the Court made an order to that effect.

On the 29th *May*, A. D. 1852, the case as amended, (a) was considered by Lord CAMPBELL C. J., ALDERSON B., MAULE J., CRESSWELL J., and ERLE J.

C. Pollock now appeared for the Crown.

The question reserved is, whether a person who was a principal in the second degree in a larceny can be guilty of feloniously receiving the stolen property.

Lord CAMPBELL C. J.—Assuming, as I think we are bound to do from the case submitted to us, that the prisoner was a principal in the second degree, he could not take the stolen property from himself.

ALDERSON B.—If one burglar stands outside a window while another plunders the house, and hands out the goods to him, he surely could not be indicted as a receiver.

MAULE J.—My Brother *Adams* seems to have intended to have asked us whether, in a case where a prisoner was, in a popular sense, guilty of receiving, he might be

(a) The amendments are inserted, *supra*, in brackets []

treated as a receiver notwithstanding the fact that he was a principal in the theft. And it is clear that he cannot.

CRESSWELL J. and ERLE J. concurred.

*REGINA v. COOKE AND HICKLEY. [462

Where perjury was committed, on an application for an order in bastardy made before justices, a former application having been dismissed on the merits: *Held*, that the prisoners were rightly convicted of perjury.

THESE prisoners were severally indicted for perjury. They were tried before JERVIS C. J. at the last Assizes for *Leicestershire* and were convicted. The cases were clearly proved, but in the course of the trial it appeared that the perjury had been committed upon the hearing of a second application for a bastardy order, a former application having been heard by the magistrates and dismissed upon the merits.

The Counsel for the prisoners contended, that the magistrates were *functi officio* after the first application had been dismissed upon the merits, and had no jurisdiction to entertain the second application. Being much pressed, observed his Lordship in stating the case, I saved this point for the opinion of the Judges. See 7 & 8 *Vict.* c. 101, and *Reg. v. Brisby*, 1 Den. C. C. 416.(a)

(a) In the case of *Reg. v. Brisby*, 1 Den. C. C. 416, A. was indicted for disobeying an order of justices adjudging him to be the putative father of a bastard child; the order was dated 6th May. A previous order had been made on the 1st January, but in consequence of errors and omissions on the face of it, it was a bad order, and the magistrates who had made the order, under their hands and seals, made a *supersedeas* of it. Held, that as the first order was a nullity, the magistrates had jurisdiction to entertain a second application, and make a new order, and that the prisoner was rightly convicted of having disobeyed the order of justices dated the 6th May.

On the 24th *April*, A. D. 1852, this case was considered by POLLOCK C. B., PARKE B., ERLE J., TALFOURD J., and CROMPTON J.

O'Brien, for the defendants.

The magistrates had no jurisdiction to decide on the *bastardy application after it had been once dismissed upon the merits. The false swearing therefore took place on the second trial, which was avoid for want of jurisdiction, and, consequently, did not amount to perjury.

Hayes, for the Crown, was not called upon.

POLLOCK C. B.—The magistrates had two points to inquire into: first, whether the case had been investigated before; secondly, whether the party was liable to maintain the bastard. They therefore clearly had jurisdiction over the matter and power to administer the oath. The question of perjury or no perjury cannot be held to depend on which point is taken first. It would not be in accordance with sound sense, if the prisoner had given false evidence on oath before the magistrates material to the charge of bastardy, that his liability to an indictment for perjury should be in abeyance until it was decided whether a previous application for a bastardy order had been dismissed on the merits. If judgment be arrested in a civil action for a defect in the declaration, it has never been said that that circumstance would prevent a witness, who had been guilty of false swearing at the previous trial at *Nisi Prius*, from being indicted for perjury.

PARKE B.—You may contend that the case cannot be heard twice before the magistrates; the previous dismissal, you may argue, may be a defence; but you cannot maintain the proposition that the magistrates on the second inquiry had no jurisdiction to hear the application and administer an oath.

ERLE J.—The Court of Queen's Bench have decided that I was wrong in holding that one inquiry on the merits before the magistrates made the matter a *res judicata*.

The rest of the Court concurred.

Conviction affirmed.

*REGINA v. WILLIAM VINCENT AND
WILLIAM WEST.

[*464

Where property is parted with by a bailee, under a mistake, his special property in it is not divested, and if a larceny of it be committed: *Held*, that it may well be laid as the property of such bailee. *Held* also, that an amendment in the name of the owner of stolen property may be made, at the trial, by order of the Court, under 14 & 15 Vict. c. 100, s. 1.

William Vincent and *William West* were indicted at the *Middlesex* Sessions, *February*, 1852, for stealing, also for receiving, forty-five pounds weight of sugar, the property of *Mathew Archard*. It appeared in evidence that *Archard* was a carman, and was employed by one *Back* to convey two hogsheads of sugar, his property, from the *London Docks* to his warehouse, and that *Archard* accordingly sent the prisoner *Vincent* with two delivery notes and one of his horses and carts for that purpose, but that the clerk of the *London Dock Company* delivered to him, by mistake, two hogsheads of sugar belonging to a third person. It was then contended, that as the hogsheads so delivered to *Vincent* were not the hogsheads he was authorized to receive, no property in them passed to his employer *Archard*, and upon the application of the Counsel for the prosecution, the Court amended the indictment by describing the sugar as the property of "the *London Dock Company*." The case then proceeded, and

it was proved that after the hogsheads were delivered to the prisoner *Vincent*, he conveyed them a considerable distance from the premises of the *London Dock Company*, and was then met by the prisoner *West* with a horse and cart, and that, assisted by *West*, he abstracted the forty-five pounds from one of the hogsheads, and delivered the same to *West*, who drove away with it. It was then contended by the prisoners' Counsel that the ownership of the property was still wrongly described, *inasmuch as the property in the *London Dock Company* was founded on possession only, and therefore ceased as soon as they had parted with the possession, although under a mistake, and the goods had been removed from their premises. The jury found both the prisoners guilty of larceny, and not guilty of receiving. Two points were reserved, 1st. Whether the amendment was an amendment within the meaning of the statute 14 & 15 *Vict. c. 100*, s. 1; 2dly. Whether the property was rightly laid in the *London Dock Company*. Judgment was postponed, and both prisoners were committed to prison to abide the decision of this case.

On the 24th *April*, A. D. 1852, this case was argued before POLLOCK C. B., PARKE B., ERLE J., TALFOURD J., and CROMPTON J.

Purry, for the crown.

Metcalf, for the prisoner *West*. *O'Brien*, for the prisoner *Vincent*.

Metcalf. It is not proposed to argue the first point as to the power of the Court to order the amendment which was made at the trial. The point for the consideration of the Court is, whether the property is rightly laid as that of the *London Dock Company*. That Company is invested with powers by 9 *Geo. 4*, c. 116, s. 157, (local

and personal acts), under the name of the *London Dock Company*.

PARKE B.—That is their corporate name?

Metcalfe. Yes.

POLLOCK C. B.—Is not the law this, that if goods are delivered to another by mistake, the special property in them is not parted with? If a pawnbroker is asked for a watch, and by mistake gives the wrong watch, according to you, he has lost his special property in it, and cannot ask for it back again.

Metcalfe. If delivered by mistake, like other bailees, *the Company could only recover by trover, after demand; *Devereux v. Barclay*, 2 B. & Al. 702. [*466 The Company could not, it is contended, bring trover or trespass, and every larceny must comprehend a trespass. Here there could be no larceny, as the possession was voluntarily parted with, and the jury have not found that the prisoner had them, the *animus furandi*; *Rex v. Mucklow*, 1 Moo. C. C. 160; *Reg. v. Thurborn*, 1 Den. C. C. 387. The *London Dock Company* had only a special property co-extensive with their possession, and they parted with the possession voluntarily.

CROMPTON J.—Have you any authority to show that a bailee who parts with the possession of property by mistake, and still remains liable, could not bring trover?

Metcalfe. In the case of the letter (*Rex v. Mucklow, supra*), where it was delivered by mistake to the wrong person, the Judges held that it was not a case of larceny.

POLLOCK C. B.—There the letter was given to him as his own property.

PARKE B.—There was no contract to re-deliver the letter. The person who received it, received it out and out.

Metcalfe. Here the carrier is appointed by the consignee, not by the consignor.

PARKE B.—No. The consignee did not authorize him to receive *these* two hogsheads.

Metcalfe. The property still remains in the owner.

POLLOCK C. B.—But the *Dock* Company have still their special property in them.

Metcalfe. No: they parted with *these* two hogsheads, intending to part with them.

POLLOCK C. B.—They meant to deliver other hogsheads, but by mistake they sent these.

*467] *ERLE J.—Suppose the *Dock* Company had been ordered to send a quantity of sugar, and by mistake they sent wine; would not their special property still continue in the wine? The property could not be in the consignee of the sugar. The property still remained in the Company, and the carrier who broke bulk is guilty of larceny.

PARKE B.—It was laid down by Lord *Kenyon*, in *Youl v. Harbottle*, Peake's N. P. C. 68, that trover will lie against a carrier who delivers goods to a wrong person through mistake. There is still a responsibility resting on the *London Dock* Company.

O'Brien, for the prisoner *Vincent*. The case finds that the sugar belongs to a third person. The property should, therefore, have been laid in the owner. If a man goes into a jeweller's shop, and the shopman by mistake gives him a ring of much greater value than he intended to do, the person who takes the ring cannot be convicted of larceny, as there is no trespass. No fraud is found here, and there was no trespass when the prisoner received the goods. The only property the *Dock* Company had in the sugar was founded on possession, and having voluntarily divested themselves of the property, they could not be said to retain the property in themselves. *R. v. Hardy*, 1 R. & R. 125. The possession had gone out of them, consequently the property is wrongly laid.

Purry, for the Crown, was not called on to address the Court.

POLLOCK C. B.—We are all of opinion that the judgment is right. This case was tried before my Brother *Adams*, and two questions were raised. The first, as to the power of the Court to amend the indictment, has been given up, and the only remaining one is whether the property is rightly laid in the *London Dock Company*. It is a misrepresentation to suppose *that where possession of property is parted with by mistake, the rights of the owner are affected. It effects no change in the property. It is like the case put by my Brother *ERLE* during the argument, where an order is sent for the delivery of sugar, and by mistake a cask of wine is sent. Here the *London Dock Company* must be considered the bailors, and when the carrier broke bulk he became guilty of larceny. No doubt the property might have been laid in the person who bailed it to the *London Dock Company*, but as it is, it is well laid in the indictment. [*468]

PARKE B.—I am also of opinion that the conviction is right. It is an ancient rule of law that, with respect to chattels, either the bailor or bailee may maintain trespass, 2 *Roll. Abr.* 21, 22.(a) Here the *London Dock Company* were the bailors—not the consignor, for he did not direct the Company to bail this particular hogshead. I think that they could maintain an action of trover, if there were a conversion of the goods, and if a felonious conversion, larceny.

ERLE J., TALFOURD J., and CROMPTON J., concurred.
Conviction affirmed.

(a) See *Com. Dig.* "Tress." B. 4.

REGINA v. WILLIAM MITCHELL, WILLIAM JACKSON, AND SARAH BROWN.

Under 14 & 15 Vict. c. 100, s. 11, if a robbery under aggravated circumstances be charged in the indictment: *Held*, that the jury may find an aggravated felonious assault with intent to rob, and that the persons found guilty of such an aggravated assault are liable to transportation for life under sects. 3 and 10 of 7 Wm. 4 & 1 Vict. c. 87; the assault following the nature of the robbery.

THESE prisoners were tried before ALDERSON B., at the last *Liverpool Assizes*, on an indictment stating *469] *that they, in and upon *Thomas Tatem*, together feloniously did make an assault, and him in bodily fear and danger of his life *then and there together* feloniously did put, and certain money of the said *Thomas Tatem* from his person and against his will, *then and there together* feloniously and violently did steal.

At the trial, in consequence of the absence of the prosecutor, the actual robbery could not be proved, as no money could be shown to have been taken from his person.

But the three prisoners were convicted on the clearest evidence of the offence of feloniously assaulting the prosecutor with intent to rob him, and the jury expressly found also on being asked the question, that this felonious assault was committed *by the three prisoners together*. The case was one in which, in the judgment of the learned Baron, it was right to sentence the prisoner to transportation; but as to the two men a question arose whether it was competent for him in point of law to pass such a sentence. There was a previous conviction of felony proved against the woman, which removed all difficulty in her case.

By Lord *Campbell's* Act, 14 & 15 Vict. c. 100, s. 11, it is enacted, that in all indictments for robbery, if it shall appear to the jury upon the evidence that the defendant

did not commit the crime of robbery, but that he did commit an assault with intent to rob, the defendant shall not by reason thereof be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an indictment for feloniously assaulting with intent to rob; but there is this difficulty, *that there are several clauses of the 7 *Wm.* 4 & 1 *Vict.* c. 87, imposing [*470 different punishments in cases of assault with intent to rob.

By the 6th and 10th sections of that act the extreme punishment for the simple offence of a felonious assault, with intent to rob, does not exceed three year's imprisonment, with hard labour.

By the 3rd and 10th sections of that act, where the felonious assault, with intent to rob, is committed by any person, together with one or more other person or persons the punishment may extend as far as transportation for life, and the lowest punishment is, that of imprisonment, with hard labour, for three years. ALDERSON B. therefore asked the Judges the following questions :—

1st. Is Lord *Campbell's* Act to be construed literally, and if so, whether the punishment must not be under the 6th and 10th sections, confined to three years' imprisonment, with hard labour?

Or 2nd. Is the true meaning of Lord *Campbell's* Act, that in any indictment for robbery, if the robbery be simple, there is included also a simple felonious assault, with intent to rob, and if the robbery be aggravated, a similar aggravated felonious assault, with intent to rob, and then whether, inasmuch as the jury have here found such an aggravated assault, the punishment may not be under

the 3rd and 10th sections extended as far as transportation for life?

That the inconvenience, if any, may be avoided in future, his Lordship said, that he thought it advisable to direct a return to the old form of indictment, which, as he was assured by the clerk of assize, formerly contained an express averment of *an assault with an intent to rob*. But this had been, in consequence of the recent alterations in the law, discontinued, *and so the difficulty arose. Judgment was deferred till the next assizes.

On the 29th *May*, A. D. 1852, this case was considered by Lord CAMPBELL C. J., ALDERSON B., MAULE J., CRESSWELL J., and ERLE J.

Lord CAMPBELL C. J.(a)—I am of opinion that the view here taken is the correct one. Where the robbery is charged as a simple robbery, the jury may find that the prisoner committed a simple assault with intent to rob; but where an aggravated robbery is charged, the jury may find an aggravated assault. If the jury find that the prisoner committed such aggravated assault, then he is liable, under the acts of Parliament, to transportation.

ALDERSON B.—The act of Parliament says, that “in all indictments for robbery, if it shall appear to the jury, upon the evidence, that the defendant did not commit the crime of robbery, but that he did commit an assault, with intent to rob, the defendant shall not, by reason thereof, be entitled to be acquitted, but the jury shall be at liberty to return as their verdict that the defendant is guilty of an assault, with intent to rob, and thereupon such defendant shall be liable to be punished in the same manner as if he had been convicted upon an

(a) No Counsel appeared on either side.

indictment for feloniously assaulting, with intent to rob." If that be so, the assault must follow the nature of the robbery, and where the assault is one under aggravated circumstances, it follows that the parties convicted are liable to transportation. (a)

MAULE J.—I am of the same opinion. The words of the 9th section, 14 & 15 Vict. c. 100, are, "if [*472
*upon the trial of any person *upon any indictment*
for robbery."

CRESSWELL J. concurred.

ERLE J.—I think that the interpretation given to the statute is the correct one. I do not, however, think it necessary that there should be an additional count in the indictment.

Lord CAMPBELL C. J.—After this decision it will be wholly unnecessary. (b)

REGINA v. JOSEPH OLDHAM.

Keys are implements of housebreaking within 14 & 15 Vict. c. 19, s. 1; for though commonly used for lawful purposes, they are capable of being employed for purposes of housebreaking, and it is a question for the jury whether the person found in possession of them by night, had them without lawful excuse, with the intention of using them as implements of housebreaking.

Semble, per MAULE J., that the printed copy of the section of the statute is wrongly punctuated, and that the word "key" is within the express terms of the act of Parliament.

At the Court of General Quarter Sessions holden for the county of *Lancaster* at *Kirkdale*, on the 20th day of *April*, 1852, *Joseph Oldham* was tried before *John William Harden Esq.* and others, Justices of the Peace, upon an indictment charging him with being found by night,

(a) ALDERSON B. remarked, that this was one of the *garrotte* robberies, now becoming common in the northern counties.

(b) See 2 Stark. Crim. Pl. 426.

having in his possession, without lawful excuse, certain implements of housebreaking to wit, one pair of pincers, ten keys, and a piece of iron, against the form of the *473] statute; and it appeared in *evidence that the prisoner was found by night and without lawful excuse in possession of a number of house-door keys and a pair of pincers, all of which articles were of an ordinary description, such as are commonly used for lawful purposes, but which were capable from their nature of being also used for purposes of housebreaking. It was objected on the trial that the evidence did not support the indictment, as the articles were not either picklock keys, implements of housebreaking, or any other articles mentioned in the first section of the statute 14 & 15 Vict. c. 19. The Chairman left it to the jury to say whether the articles so found in the prisoner's possession were implements which might be used for the purposes of housebreaking, and whether at the time he was so found in possession of them, it was his intention to use them as implements of housebreaking. The jury found the prisoner guilty. But inasmuch as the question raised on the trial is not free from doubt, and the Court was strongly urged by the learned Counsel for the prisoner to submit it for the consideration of the Judges of the superior Courts, judgment was postponed in order that such opinion might be taken, and the prisoner was remanded to the custody of the governor of the House of Correction at *Kirkdale* until the *Midsummer Sessions*.

On the 29th *May*, A. D. 1852, this case was considered (a) by Lord CAMPBELL C. J., ALDERSON B., MAULE J., CRESSWELL J., and ERLE J.

Lord CAMPBELL C. J.—I think that the conviction

(a) No Counsel appeared on either side.

ought to be affirmed. The jury have found that there was an intent on the part of the prisoner to use the keys as implements of housebreaking, and though they *may be used for lawful purposes, it is clear they [*474 may also be used for the purposes of housebreaking.

ALDERSON B.—Suppose that all the keys of a long street were found in the possession of a person without lawful excuse, there could be very little doubt that he meant to use them as implements of housebreaking; or, suppose a chisel, which fitted a mark in a particular door, which some one had evidently been endeavouring to force open, was found upon a man, there could not be much doubt that it was an implement of housebreaking, although capable of being used for lawful purposes, and not specified in the act of Parliament.

MAULE J.—I find in Mr. *Greaves's* edition of the statutes, that the words of the statute are, “Or if any person shall be found by night having in his possession, without lawful excuse (the proof of which excuse shall be on such person), any picklock key, crow, jack, bit, or other implement of housebreaking.” There is a comma after the word key, and not one before it. But on the Parliament roll it is well known there were no stops, and I think that the proper way to read the section is—any picklock, key, crow, &c. If this is not so, then the act of Parliament does not comprehend the most usual implements of housebreaking—skeleton keys. The word picklock(a) is perfectly intelligible; *and [*475

(a) The section of the statute in Mr. *Greaves's* edition is accurately copied from the edition published by the Queen's printers; and all the modern acts of Parliament issued by those printers are, it may be remarked, printed with stops. As to the admissibility in evidence of copies of private and local and personal acts of Parliament, not public acts, if purporting to be printed by the Queen's printers, see 8 & 9 Vict. c. 113.

The word “picklock” has for many centuries been in use to denote an instrument of housebreaking. A picklock is described by *Ainsworth* as, *instrumentum*

the word key would comprehend a skeleton key and any kind of key capable of being employed for purposes of housebreaking. If a man, therefore, is found in possession of any of these without lawful excuse, they are within the express words of the act of Parliament.

CRESSWELL J.—I am of the same opinion as my Brother MAULE.

ERLE J.—Any implement capable of being used for the purposes of housebreaking, where the jury find that the person with whom they are found, has them in his possession, for the purposes of housebreaking, are, in my opinion, within the statute.

REGINA v. WILLIAM ION.

Where the prisoner placed a forged receipt for poor rates in the hands of the prosecutor for the purpose of inspection only, in order, by representing himself as a person who had paid his rates, fraudulently to induce the prosecutor to advance money to a third person: *Held*, that this was an uttering within 1 Wm. 4, c. 68, s. 10.

At a Session of Oyer and Terminer and Gaol Delivery, holden for the jurisdiction of the *Criminal Court*, in December, 1851, *William Ion* was tried before the Right Hon. J. S. WORTLEY, Recorder of *London*, upon an indictment for feloniously uttering, disposing of, and putting off a forged receipt for 2*l.* 4*s.*, knowing, &c., with intent to defraud.

It appeared in evidence that the prosecutor, *James Dwyer*, was a money lender; that one *James Gillard* had

quo sera furtim aperitur. The word is also used by *Shakespeare*, as also by *Brown*, *L'Estrange*, and others. *Johnson* defines it as "an instrument by which locks are opened *without a key*;" and such a word as "picklock-key," it may be added, is not in use.

applied to him for a loan of money, and had proposed the prisoner as a surety for the amount. That thereupon the prosecutor proceeded to the house of the prisoner for the purpose of satisfying himself as to the prisoner's responsibility, and with this object required the production of the prisoner's receipts in respect of *that house.

That the prisoner, with the view of causing the [*476 money to be advanced to *Gillard* (who was found to be a man of no responsibility) upon their joint security, produced to *Dwyer* and placed in his hands (but for the purpose of inspection only) three documents purporting to be receipts for poor rates in respect of the said house, one of which was the forged receipt in question. The prosecutor inspected these documents, the prisoner remaining present during such inspection; he then received back the documents from the prosecutor and placed them upon a bill file. The foregoing facts comprised the uttering, disposing of, and putting off mentioned in the indictment.

It was objected upon the trial that these facts did not amount to an uttering, disposing of, or putting off sufficient to support the indictment.

The learned Recorder, however, ruled the contrary, and as the other necessary facts were proved to the satisfaction of the jury, they found the prisoner guilty. The jury also found, expressly in answer to a question put to them, that the prisoner placed the receipt in the hands of the prosecutor for the purpose of fraudulently inducing him to advance the money to *Gillard*.

Considering it doubtful whether he was correct in his ruling, the learned Recorder postponed judgment upon the indictment, and committed the prisoner to the gaol of Newgate, in order that the opinion and decision of the Judges might be taken upon a case to be stated.

On the 24th *April*, A. D. 1852, this case was argued

before JERVIS C. J., ALDERSON B., COLERIDGE J., WIGHTMAN J., and TALFOURD J.

Parry, for the Crown.

Metcalfe, for the prisoner.

It is submitted that this conviction is improper. The *477] indictment charges the "uttering, disposing, *and putting off" of a forged receipt. The evidence is, that the prisoner placed the receipt in the hands of *Dwyer* for inspection only. That is found in the case, and it cannot amount to either a "disposing of," or "putting off," which words imply that a person has parted with the document. It was held in *Rex v. Woolridge*, 1 Leach, 307, (a) on an indictment under the repealed statute 8 & 9 Wm. 3, c. 26, that the putting off must be complete, and, therefore, where the defendant laid on a table a quantity of counterfeit shillings, for which he was to receive a certain sum, but while the counterfeit money was being counted, and before the prisoner received the price of it, he was apprehended, it was decided not to be within the act. The question, therefore, resolves itself in this, does the mere placing the receipt in the hands of another for the purpose of inspection, amount to an *uttering*? In *Rex v. Shukard*, (b) it was held, that shewing a

(a) Also in 1 *East P. C.* 179.

(b) The defendant was tried before Lord *Ellenborough*, at the Summer Assizes for *Leves*, in the year 1811, for a misdemeanor, upon an indictment which charged him with having unlawfully, knowingly, and wilfully uttered and published a certain promissory note, containing the words "five hundred," expressing the sum of the said promissory note in white letters on a black ground, without being authorized or appointed for that purpose by the Governor and Company of the Bank of *England*: the note was set out as follows:—

"Bank of *England*, 1811.

"No. 43106.

No. 43106.

"I promise to pay Mr. *James Jones*, or bearer, on demand, the sum of five hundred pens. 1811.

"June 11. *London*.

11 June, 1811.

"For the Governor and company of the Bank of *England*.

Ed. Denton."

*man an instrument, the uttering of which would be criminal, though with the intent of raising a false idea in him of the party's substance, was not an "uttering" or "publishing" within 13 Geo. 3, c. 79. Nor will the leaving it afterwards sealed up with the person, to whom it is shewn, under cover, that he may take charge of it as being too valuable to be carried about, be an uttering or publishing. In the case of *Reg. v. Radford*, 1 Den. O. C. 59, it was held that shewing a forged receipt to a person, *with whom the defendant is claiming credit for it*, is an uttering within the 1 Wm. 4, c. 66, s. 10, though the defendant refused to part with the possession of it. But it is submitted that the present case is perfectly distinguishable from *Reg. v. Radford*. There the document was exhibited as a receipt and acquittance for money by a person claiming credit, for having paid a sum of money which in fact he had not paid. [*478]

against the form of the stat. (13 Geo. 3, c. 79.) The defendant was convicted. The point reserved for the opinion of the Judges was, whether there was a sufficient *uttering and publishing*, in this case of the note answering in other respects the description of the act *as having white letters on a black ground*?

The defendant had introduced himself to the acquaintance and family of a person of the same name, at *Brighton*, upon a fabricated story. And in order to persuade the innkeeper that he was a man of substance, one day, after dinner, he pulled out a pocket-book and shewed the innkeeper a five hundred and a fifty pound note of the above description, of which he only saw the sums and general form. The defendant said that he did not like to carry so much property about him, and desired the innkeeper to take care of them for him. The innkeeper took charge of them accordingly, and thought the defendant acted very prudently.

They were put in a cover and sealed up by the defendant himself; the witness, the innkeeper, received them from him in an envelope, which, after having kept for some time, upon some suspicions afterwards created by the conduct of the defendant, he broke open, and found them to contain the notes above mentioned.

In *Mich. Term*, 1811, the Judges held the conviction wrong, being of opinion that this did not amount to an uttering. That in order to make it an uttering they seemed to be of opinion that it should be parted with or tendered, or offered, or used in some way to get money or credit upon it. *Russ. & Ry.* 200.

CRESSWELL J.—By exhibiting the receipt he was seeking to relieve himself from the payment.

JERVIS C. J.—If this receipt had been produced to the *479] *collector of the poor rates, it would have been an uttering.

Metcalfe. If at the time he claimed to have paid the rate demanded.

JERVIS C. J.—The prisoner produced the receipt for the purpose of shewing that he owed no rates. If, in the case of justification of bail, a person had produced some bank notes to shew that he was possessed of a sufficient amount of property, would not that amount to an uttering of the notes? Here the prisoner exhibits a receipt to shew his solvency.

WIGHTMAN J.—Suppose the proposed bail were asked, in examination before the Judge at Chambers, “Have you paid all the rates due in respect of your house?” and he had said, “Yes, and I now produce the receipts,” and he then produced for inspection, among others, one which was a forgery?—or, supposing a man proposes to borrow a sum of money, and, in order to satisfy the lender, who inquires, has he paid all his rates, he replies in the affirmative, and produces the receipts as proof of having paid them, what would you say to that case?

Metcalfe. In none of these cases is the party seeking to obtain money or credit on the document itself; and it was held in *Shukard's case*, that in order to make it an uttering, the document must be parted with, or tendered, or offered, or used in some way to get money or credit upon it. In *Radford's case*, the prisoner was seeking to absolve himself from payment, and if accounts had been balanced between the parties, an action for money had and received would have laid, as was held in *Gingell v. Purkins*, 4 Exc. Rep. 720; *Standish v. Ross*, 3 Exch. 527.(a) But in the present case, no action for money

(a) Overruling *Lee v. Merrett*, 8 Q. B. 820.

had and *received would lie. In *Radford's case*, [*480 POLLOCK C. B. puts this supposition,—suppose a man shewed a ticket in passing a toll bar, and passed on, would not that be an uttering? But that is not like the present case.

WIGHTMAN J.—There the party would be claiming credit upon the instrument.

Metcalfe. The word uttering is defined in *Webster's Dictionary*, as “putting into currency.”

JERVIS C. J.—You say, that to constitute an uttering, the instrument must be offered to get money or credit upon it. The words of the statute(a) are, if uttered “with intent to defraud.”

Metcalfe. Lord Abinger, in *Reg. v. Puge*, 8 Car. & P. 122, held, that uttering counterfeit coin, without an intention to defraud, was not an offence within the statute.

CRESSWELL J.—Suppose the prisoner, instead of the receipt, had exhibited a roll of forged bank notes, would not this, then, be like *Shukard's case*?

Metcalfe. *Shukard's case* seems directly in point.

Parry, for the Crown.

Rex v. Shukard is a different case from the present. It is submitted that the principle which governs cases of uttering is, that if a person by word or deed represents a false document as a genuine one, with the intention of deceiving the party to whom he exhibits it, it is an offence. The intent to deceive is a direct presumption of law. The prisoner does not produce the receipt out of bravado. He wants to obtain a sum of money, whether for himself or for another it is quite immaterial, and in order to obtain it, he exhibits the receipt. He, therefore, virtually obtains money *by means* of the forged receipt. The prosecutor, who is asked to lend his money, goes to

(a) 11 Geo. 4 & 1 Wm. 4, c. 68, s. 1C.

*481] the prisoner for the purpose of *satisfying himself as to the prisoner's responsibility, and asks the prisoner whether he has paid his rates; he says, that he has paid them, and produces the receipt. If the prisoner had not shewn the receipt, but had made this representation, and had obtained money thereby, would it not have been a false pretence? What is the difference between forgery and false pretences? One is verbal, the other documentary. Forgery, if translated, is making a false document.

ALDERSON B.—The difference between obtaining money by false pretences and uttering is, that in false pretences, the offence consists in obtaining the money, while in uttering, the offence is the *uttering*.

Parry. It is found in the case, that the prisoner put the documents into the prosecutor's hands. In *Shukard's case*, the prisoner merely allowed the prosecutor to see the words "Five hundred" on the notes, and the prisoner himself then sealed up the notes in an envelope, and left them in the care of the prosecutor. The Court in that case held, that to constitute an uttering the instrument must be offered with intent to obtain credit "upon it."

ALDERSON B. "Upon it," not *by means of it*.

Parry. That case bears out the present argument. Here is a clear uttering for a specific purpose,—to raise money. Suppose the case of a *pawn ticket*, upon which money is very often raised by poor persons, a man desiring to obtain an advance, says to another, "I have goods in pledge," and shews him a forged ticket, and thus gets money upon it, it is submitted that that would without doubt, be a case of uttering. Here the prisoner meant, by representing the receipts to be genuine, to raise money. It is contended, on the part of the prisoner, that the document itself must be parted with, or used with intent to get money *upon it*.

JERVIS C. J.—Have you looked at the words of the *act of Parliament, 13 Geo. 3, c. 79 ; no intent to defraud is necessary ; the offence is the uttering [*482 and publishing ; and the Judges in *Shukard's case*, held that there was no publication.

ALDERSON B.—This a stronger case. The stat. 11 Geo. 4 & 1 Wm. 4, c. 66, uses the words uttering, disposing of, or putting off.

CRESSWELL J.—The prisoner, by showing the receipt did not obtain any benefit to himself.

Purry. The prisoner and his friend were acting together.

CRESSWELL J.—They may have been guilty of a conspiracy, or of obtaining money by false pretences, but the question is, is this an uttering ?

Purry. In *Rex v. Birkett*, R. & R. 86, where a forged bill of exchange payable to the order of the defendant was given as a pledge only, but to obtain credit, it was held that there was a fraudulent intent within the meaning of the statute.

CRESSWELL J.—There the defendant obtained credit. That case is just the same as if a banker asked a man for his securities, and he were to produce forged securities, and deposit them with the banker.

Purry. Suppose that the money lender, when the defendant exhibited the receipt, said, “ Oh, yes, I see you have paid your rates, here is the 5*l.* you want,” would not the case then have been an uttering ?

COLERIDGE J.—Suppose the prisoner had received the money lender in another person's house and had said “ this is my house,” what offence would that be ?

Purry. If he obtained no money, then it would be a mere *lie*. But this is uttering a forged document.

WIGHTMAN J.—To induce the prosecutor to part with his money to his loss.

Parry. An intention to defraud is found in the case. In *Reg v. Cooke*, 8 Car & P. 582, it was held that a conditional uttering was as much a crime as any *483] *other uttering. In *Rex v. Birkett*, R. & R. 86, Baron *Graham* said, that there might be an uttering, &c., though the document was valueless—as valueless as the receipt here.

COLERIDGE J.—The statute 33 Hen. 8, c. 1, enacted “That if any person or persons shall falsely and deceitfully obtain or get into his hands or possession any money, goods, chattels, or jewels, or other things, of any other person or persons, by colour and by means of any privy *false token*, or counterfeit letter, made in another man's name to a special friend or acquaintance, for the obtaining of money, &c., from such person, and shall be thereof convicted, &c., every such offender shall suffer punishment by imprisonment, setting upon the pillory, &c.” This statute led to the statute of false pretences; (a) now, what would have been the offence of exhibiting this receipt in the manner specified in the case, before these statutes?

Parry. Forgery at common law.

Metcalf replied.

WIGHTMAN J.—There are three circumstances to be considered in this case. *First*, there is a false document; *secondly*, the uttering such document; and *thirdly*, the uttering, &c. to induce the prosecutor to give a person credit to *his loss*. In fact, the prosecutor is defrauded.

COLERIDGE J.—The case does not state that money was actually given.

WIGHTMAN J.—Suppose he had been defrauded?

Metcalf. It is only found that the receipt was placed in the hands of the prosecutor for the purpose of inducing him to advance money to *Gilliard*.

(a) 30 Geo. 2, c. 24.

CRESSWELL J.—To induce him to give credit to *Gilliard*.

*COLERIDGE J.—It is not found in the case that *Gilliard* was insolvent. [*484

JERVIS C. J.—The question for us is, was there an uttering,—was the Recorder correct in ruling that the facts proved an uttering?

WIGHTMAN J.—It is not necessary that money should be obtained on the instrument, but *by means of it*.

Metcalfe. In *Reg. v. Page, ante*, Lord Abinger decided that unless there an intent to defraud was shown, a party could not be convicted.

ALDERSON B.—That is overruled. The intent is inferred by law. If a forged instrument is put away in order to get money or credit, that amounts to an uttering.

WIGHTMAN J.—I can understand the distinction between gaining an advantage directly upon the instrument, and of gaining an advantage indirectly by means of it. You must assume, from the facts, that there was an attempt to defraud by means of it.

Metcalfe cited *Webster's Dict.* tit. "*Uttering*;" *U. S. v. Mitchell*; *U. S. Dig.* "*Uttering*;" *Reg. v. Page, ante*, *R. v. Harris*, 7 C. & P. 428; *R. v. Longhran, Crawford v. Dixon (Irish)*, 333; *R. v. Wavell*, 1 Moo. 224.(a)

Cur. adv. vult.

On the 12th of *May*, A. D. 1852, this case was again argued before Lord CAMPBELL, C. J., POLLOCK C. B., JERVIS C. J., COLERIDGE J., CRESSWELL J., ERLE J., TALFOURD J., and CROMPTON J.

Parry, for the Crown.

Metcalfe, for the prisoner. The question turns on the

(a) See *post*, 488, 489.

*485] true definition of the word "utter," as used in the *statute. The words of the indictment are "uttered, disposed of, and put off." The words of the statute under which the prisoner is indicted, 11 *Geo.* 4 and 1 *Wm.* 4, c. 66. s. 10, are "shall offer, utter, dispose of or put off." The word "offer" is omitted from the indictment. It will hardly be contended on these facts that the documents in question were disposed of and put off. *Woolridge's case*, 1 Leach C. C. 307, is an authority to show that merely putting an article into the hands of another, where it was taken back, is not a disposing of or putting off.

Lord CAMPBELL C. J.—Does the case in *Leach* go so far as to decide that there can be no putting off without an intent to part with the instrument?

Metcalfe referred to *R. v. Varley*, 2 W. Bla. 632.(a) To bring the case within the meaning of the word disposing of, it is not sufficient that the document is produced for the purposes of inspection only.

Lord CAMPBELL C. J.—You say that in order to constitute a disposing of, the property must be parted with.

Metcalfe. At common law, uttering, *per se*, is no offence, per CRESSWELL J., after consultation with *Patteson* J. *Reg. v. Boulton*, 2 Car. & Kir. 604. The first statute on the subject was 25 *Edw.* 3, st. 5, c. 2:—"And if a man bring false money into this realm, counterfeit to the money of England, as the money called *Lushburg*, or other like to the said money of *England*, knowing the money to be false, to merchandize, or make payment in deceit of our said Lord the King and of his people—"

Lord CAMPBELL C. J.—The word "utter" does not occur there.

Metcalfe. It does not. 1 & 2 *Ph. & M.* c. 11, recited,

(a) See also 1 *East*, P. C. 164.

"Where, &c., many ill-disposed persons, &c.,
 *have brought into this realm, &c., forged and [*486
 counterfeit money," &c., and have "uttered the same
 here by merchandizing and otherwise," &c., and then
 enacted, "that if any person, &c., shall bring any such
 false and counterfeit coin or money, &c., knowing the
 same, &c., to be false and counterfeit, to the intent to
 utter or make payment with the same within this realm,
 &c., by merchandizing or otherwise (*i. e.* dealing, *ejusdem*
generis.) 15 Geo. 2, c. 28, increasing the punishment for
 uttering money, contains these words: "If any, &c., shall,
 &c., utter or tender in payment," &c. In 5 Eliz. c. 11,
 s. 2, 3, the first statute against forgery of private docu-
 ments, the words were "shall pronounce, publish, or give
 in evidence." At the Revolution, paper currency com-
 menced; 8 & 9 Wm. 3, c. 20, s. 36, was the first act pro-
 viding for forgeries upon the Bank of England. 11 Geo.
 1, c. 9, s. 6, was the first against uttering forged notes of
 the Bank of England. It recited that "and whereas of
 late divers frauds and deceits have been put upon the
 said Governor and Company of the Bank of England and
 other persons, by the uttering, forging, &c., and by the ten-
 dering in payment, uttering, vending, exchanging, and
 bartering of such altered, &c., bills, &c., to the prejudice
 of public credit and to the great hurt and diminution of
 trade and commerce. For redressing whereof for the
 future, be it enacted, &c., shall tender in payment, utter,
 vend, exchange, or barter. In 2 Geo. 2, c. 25; 7 Geo.
 2, c. 22; 18 Geo. 3, c. 18, the words were "utter or
 publish as true." In 43 Geo. 3, c. 13, 19, s. 1 (foreign
 bills), "tender in payment or in exchange, or otherwise
 utter or publish as true."

Lord CAMPBELL C. J.—The expression "tender in pay-
 ment" is there considered an uttering;—the words are
 "or otherwise utter."

*487] **Metcalf.* That is so. In 45 *Geo.* 3, c. 89, the words of the statute are, "offer, dispose of, or put away." In 1 *Wm.* 4, c. 66, s. 10, the words are, "offer, utter, dispose of, or put off;" the law having been altered to meet *Wooldridge's* case and others. Various definitions of the word "utter" occur in the works of learned writers. *Webster's* definition of it when used in this sense is as follows:—1, "To disclose, to discover, to divulge, to publish;" 2, "to sell, to vend, as to utter wares (this is obsolete unless in the law style);" 3, "to put or send into circulation, to put off as currency or cause to pass in commerce, as to utter coin or notes—a man utters a false note who gives it in payment, knowing it to be false." The following is *Richardson's* definition:—"To put out, to expel, to eject, to come, put or send forth, to vent, to emit, to produce publicly (metaphor), to speak, to tell, to pronounce, to proclaim, to publish." The word "utter" is thus defined by *Johnson*:—"From the adjective; to make public or let out—*palam facere*, 1, "to speak, to pronounce, to express;" 2, "to disclose, to discover, to publish;" 3, "to sell, to vend;" 4, "to disperse, to emit at large; 'to preserve us from ruin the whole kingdom should continue in a firm resolution never to receive or utter this fatal coin'—*Swift*;" 5, "to put forth." The case of *R. v. Shukard*, R. & R. 200, is expressly in point.

LORD CAMPBELL C. J.—The words of the report are "they seemed to be of opinion."

JERVIS C. J.—You observe the words "*upon it*." The Judges were of opinion that it should be parted with, or tendered or offered, or used in some way to get money or credit upon it.

Metcalf. In the case now before the Court the document was not used to get money or credit upon it. The prisoner in effect said, "I am a man of substance, here

are my receipts." The case of **Reg. v. Radford*, [488 1 Den. C. C. 59, will no doubt be relied upon by the prosecution; but the present case is distinguishable from that; because in *Reg. v. Radford*, credit was obtained directly by means of the instrument.

POLLOCK C. B.—There the prisoner said, in effect, "Here is your receipt in discharge of payment."

Metcalfe referred to *Gingell and Purkins*, 4 Exch. R. 730; and *Standesh v. Ross*, 3 Exch. R. 527.

JERVIS C. J.—Take the case of justification of bail;—a man produces a forged deed, or a forged lease, to prove that he is of sufficient property, would that be an uttering?

Metcalfe. That is going farther than the present case. There there would be an obtaining credit upon it. In the 11th edition of a work, formerly edited by one of your Lordships, (a) *Arch. Crim. Pl.*, by *Welsby*, Mr. *Welsby*, who may be cited as authority, comments on the words, "utter or publish."

POLLOCK C. B.—Not yet an *authority*.

Metcalfe. It is no doubt a rule that a writer on law is not to be considered an authority in his lifetime. (b) The only exception to the rule, perhaps, is the case of Justice *Story*.

COLERIDGE J.—*Story* is dead.

CRESWELL J.—No doubt the cases are carefully abstracted by Mr. *Welsby* in the passage you refer to.

Lord CAMPBELL C. J.—It is scarcely necessary to say that my opinion of Mr. *Welsby* is one of sincere respect.

Metcalfe cited *R. v. Harris*, 7 Car. & P. 428. In

(a) Lord Chief Justice JERVIS.

(b) This rule seems "more honoured in the breach than in the observance." The annotations of Mr. *Greaves*, *Russ. on Crimes*, and the learned work of Mr. *Pitt Taylor* on Evidence, are constantly cited in the Crown cases; and the writings of *Chitty*, *Starkie*, and also of *Story*, were referred to in the same way in their lifetime.

*489] *the case of *R. v. Longhran*, 3 Cr. & D. 333 (*Irish Rep.*) the prisoner handed to another man, a parcel containing 100 counterfeit shillings—requesting him to deliver the parcel to prisoner's wife, held by *Crampton J.* to be no uttering. In *Dewlin's case*, *Alison's Principles of Criminal Law*, 402, a forged note was taken by prisoner out of his pocket and put in his hand, whence it fell to the ground, and the prisoner was about to hand it over the counter, held to be no uttering. It is observed in the same work, "It is sufficient to complete the crime if the forged instrument have been uttered, *i. e.* *presented in payment*, or made the foundation of a claim, though no advantage whatever was gained from the act. In the *Report of the Penal Code of Massachusetts*, 1844, *Crim. Law Commissioners*—the following definition of the word "uttering," occurs;—tit. Forgery: 12.—"The uttering of writing is in respect to forgery, &c., the fraudulently and deceptively offering, passing, negotiating, assigning, transferring the same, or putting the same in circulation as being true and genuine, according to its apparent import by a person knowing the same to be false, with the intent that any person shall be thereby deceived, and that any person shall be thereby defrauded or prejudiced;"—citing *R. v. Shukard*. In *Metcalf and Perkins's United States Dig.* Forgery, 18, "passing" a paper is defined as putting it off in payment or exchange; "uttering," as a declaration that it is good with an intention to pass, or an offer to pass it; *U. S. v. Mitchell*, 1 Bald. 366. So in *Curtis's United States Digest*. Pledging a counterfeit note which was to be redeemed at a future day, is not a "passing within the meaning of the act." *Gentry v. The State*, 3 Yerg. 451. *Putnam's Supp. to M. & P. Digest*, Forgery, 98.

*490] JERVIS C. J. If the landlord had called for his rent, *and the same ceremony had been gone through by the prisoner, would that be an uttering?

Metcalfe. That must be admitted.

JERVIS C. J.—The jury have found that there was an intent to defraud.

Lord CAMPBELL C. J.—In *Reg. v. Radford* the credit was not obtained *upon* the instrument, but *in consequence* of it.

Metcalfe. In conclusion, it is submitted that in order to make an uttering, the instrument must be used in some way to get money or credit upon it.

Parry, for the Crown.

The only point for the consideration of the Court is, is this an uttering? on the last argument it was contended that no intent to defraud appeared.

Lord CAMPBELL C. J.—The jury have found that there was an intent to defraud.

Parry. The words of the act of Parliament are “utter, or put off;”—not as in the old statute, “put away,” and it is submitted that the present facts amount to a putting off. The uttering of a receipt is for the purpose of covering an antecedent fraud.

COLERIDGE J.—Suppose a receipt is produced when a sum of money is claimed.

Lord CAMPBELL C. J.—Or upon the settlement of an account a forged receipt is produced?

Parry. It is employed for the purpose of fraudulently obtaining money, but not upon it. A servant is charged to pay money; he says, “I have paid it, and I produce the receipt;” he does not get money upon it, but surely that would be an uttering. Supposing the person had been indicted for forging the instrument; the intent to defraud is a direct presumption of law; if this be an instrument for the forgery of which he might have been indicted, could he not be convicted of uttering?

R. v. Cook, 8 Car. & P. 582, before *PATTESON J., [*491 is an authority in support of this view. There, however,

it is admitted the prisoner got credit on the instrument; and so here.

LORD CAMPBELL C. J.—No; not upon it. *R. v. Cooke* comes in the class of *R. v. Shukard*, and does not advance your argument.

Parry. The prisoner gets credit for the payment of his rent.

POLLOCK C. B.—Not from his landlord.

JERVIS C. J.—I am desirous that the decision of the Judges in *R. v. Shukard* should be considered. How can a man get money on a Court-roll, exhibited for the purposes of fraud?

Parry. Perhaps in *Shukard's case* the Judges were not satisfied that there was evidence that the defendant "published" the notes. It has been argued that the prisoner, in the present case, did not use the forged receipt to get credit upon it; but, whether he or a third person obtained the credit, cannot make any difference. (*R. v. Birkett*, R. & R. 86.)

POLLOCK C. B.—Here the receipt is not used against the landlord or the rate collector for the object for which a receipt is intended, but for a collateral purpose. Is not the present like the case where a man points to plate lying in a room, as a proof that he is rich, and thereby obtains credit?

Parry. That would be a false pretence.

JERVIS C. J.—The question is, is not the rule in *R. v. Shukard* too strict?

LORD CAMPBELL C. J.—If in the case of the justification of bail, a false receipt be produced and its production be an uttering, then there is an uttering here.

Parry cited *Reg. v. Welch*, 2 Den. C. C. 78.

Metcalfe replied.

Cur. adv. vult.

*On the 29th May, A. D. 1852, the judgment of the Court was given by Lord CAMPBELL C. J. (a) [*492

We are of opinion that this conviction ought to be affirmed. Upon consideration there clearly seems to us to have been an uttering of the forged receipt within the meaning of 11 Geo. 4 & 1 Wm. 4, c. 66, s. 10.

If it had been used in the manner stated for the direct purpose of gaining credit for the payment which it purports to vouch, there can be no doubt, since the case of *R. v. Radford*, that there would have been a sufficient uttering. But the prisoner's Counsel contended, that there cannot be an uttering of a forged receipt unless it be used directly to gain credit upon it by its operating as a receipt; so that merely using this receipt for the purpose proved, to induce a belief that he had paid the money, and therefore was a man of substance, does not amount to an uttering within this act of Parliament. *R. v. Shukard*, which was mainly relied upon for this distinction, does not seem to us to support it. That case is entitled to the highest respect, and upon similar facts we should submit to its authority. But the learned Judges there did not proceed upon the distinction that to make the using of a forged negotiable instrument a felonious uttering, the intention of the prisoner must be to gain credit upon it by making it operate as such. They appear to have thought that there the evidence was not sufficient to show an intention in the prisoner to induce the innkeeper to advance any money or to give credit upon it to him. The doctrine supposed to be established by that decision is, "that in order to make it an uttering it should be parted with or tendered or used in some way to get money or credit upon it." The words "upon it" we

(a) The Editor is indebted to the kindness of the Lord Chief Justice for his Lordship's MS. of the foregoing judgment.

*493] consider as equivalent to "by means of *it;" otherwise there could hardly be an uttering of Court rolls and other instruments enumerated in the statute.

In the present case it is expressly found "that the prisoner placed the receipt in the hands of the prosecutor for the purpose of fraudulently inducing him to advance money to *Gilliard*." This was a using of the forged receipt to get money upon it or by means of it, as much as if the prisoner himself had been to the borrower of the money, and the receipt had purported that he had paid the rates, and the prosecutor had thereupon advanced him a sum of money, and had been cheated out of it by him.

We, therefore, think that the conviction was according to decided cases and sound principles of law.

REGINA v. CHARLES NASH.

On an indictment for forging and uttering a transfer of shares in a railway company: *Held*, that the register of shareholders bearing the seal of the company, and kept according to the 8 & 9 Vict. c. 18, s. 9, is evidence to shew that an individual is a shareholder, without further authentication: and that in order to prove that such individual is liable to be defrauded by the forging and uttering of a transfer of the shares, it is not necessary to give further proof of his title to the shares.

Held, per MAULE J., that a man may be convicted of forging and uttering an instrument, *with intent to defraud*, though there is no person in a situation to be defrauded by his act.

THE prisoner was tried and convicted before the Right Hon. J. S. WORTLEY, the Recorder of *London*, for feloniously forging and uttering a transfer of 196 shares in the capital stock of a certain company, established by act of Parliament, called the *Waterford, Wexford, Wicklow, and Dublin* Railway Company, with intent to defraud.

The forged instrument was as follows:—

*I, *Peter Hanstock*, of *Ballycall*, in the county of *Wexford*, gentleman, in consideration of the sum [*494 of five pounds paid to me by *Edward Pearce*, of *Chester Street, East Greenwich*, in *Kent*, gentleman, do hereby bargain, sell, assign, and transfer to the said *Edward Pearce* the one hundred and ninety-six shares of 20*l.* each, numbered —, in the register of shareholders, registered in my name of and in the undertaking called the *Waterford, Wexford, Wicklow, and Dublin Railway Company*, To hold unto the said *Edward Pearce*, his executors, administrators, and assigns, subject to the several conditions on which I held the same immediately before the execution hereof. And I, the said *Edward Pearce* do hereby agree to accept and take the said shares, subject to the conditions aforesaid. As witness our hands and seals the 31st day of *May*, in the year of our Lord, 1851.

Signed, sealed, and delivered }
by the above named *Peter Han-* } *Edward Pearce* (I. S.)
stock and *Edward Pearce*, in the } *Peter Hanstock* (I. S.)
presence of

Charles Nash,

52 *Parliament Street*, *London*, gentleman.

It appeared that Capt. *Owen*, who was called on behalf of the prosecution as a witness, had been the original holder of the shares, and he stated on his examination, that considering himself as having been unfairly selected as a defendant in some actions by landowners, he was anxious to protect himself from liability, and with that view he had transferred the shares in question, without any consideration, to *Peter Hanstock*, but the actual transfer was not proved. In order, however, to shew that *Peter Hanstock* was registered as a shareholder in respect of these shares, *and that he would be [*495 treated by the company as a person entitled to

deal with them, to receive any dividends payable on them, or to transfer them, the register of shareholders, bearing the seal of the company, and kept according to the act of Parliament, 8 & 9 Vict. c. 16, s. 9, was tendered as evidence, and after objection on the part of the prisoners was received. It was further objected that it was necessary that the title of *Hanstock* should be shewn, and that the transfer from Capt. *Owen* to him should be proved for that purpose, but the learned Recorder overruled the objection.

On the 16th *August*, 1851, the prisoner sent to the offices of the company in the *Strand* the forged instrument in question, together with the following notice :—
To the *Dublin* and *Wicklow* Railway Company.
To the Secretary, Bookkeeper, and all concerned.

I hereby require, pursuant to the statutes, the registration of each of the transfers mentioned at foot sent by me to you. And also require to be delivered to me within forty-eight hours certificates of proprietorship of and in the shares under each of such transfers respectively, pursuant to the statutes, and the 11th and 15th sections of Companies' Clauses Consolidation Act, now paying and offering to pay the legal fees for such registration and certificates.

G. Nash, Jr., for Edward Pearce and Self.

Westminster, November 7th, 1851.

Ritchie to Edward Pearce ; Allen to ditto ; Nash and Nash to ditto ; C. Nash to ditto ; C. Nash to ditto ; Wilmot to ditto ; Whittaker to ditto ; Carter to ditto ; H. Hennissey to ditto ; Gallageher to ditto ; Peyton or Payton to ditto ; Foy to ditto ; Hanstock to ditto ; Scully to ditto ; Kenny to ditto ; Whittaker to ditto ; E. Pearce to C. Nash.

*496] *The circumstances shewed, that the prisoner having obtained a knowledge of *Hanstock's* hand-

writing by inducing him to sign an instrument which he told him was a proxy paper, and to be used for the interest of Captain *Owen* and Lord *Courtoun*, his landlord, and availed himself of such knowledge to forge his signature to the document in question, the body of which was in the prisoner's handwriting. The *Waterford, Wexford, Wicklow, and Dublin* Railway Company had paid no dividend, and there seemed no probability of any being declared at the time of the forgery; the question of winding up the company had been considered; the shares were not of any marketable value; but the company had the power to enforce payment of calls, and one of 2*l.* a share was about to be made. Under these circumstances the learned Recorder told the jury, upon the question of the intention to defraud, that it was not necessary to find an intent to defraud any one in particular, but they must have in view some person who could be defrauded, so that the consequence of the prisoner's act would necessarily or possibly be to defraud some person, and that it was for them to say whether, as *Hunstock* would be the person to whom the dividends, if any (of which there did not seem to be much probability), would legally be payable, he might not have been defrauded if the company had got into better circumstances; or whether the company might not have been defrauded if they had been induced by the forgery to insert *Pearse's* name on the register, and had made a call which they appeared to be about to do, or whether any person might not have been defrauded if induced to advance money on the shares, in anticipation of the company coming round, and on the faith that *Pearse* was the real owner of them.

The Recorder therefore requested the opinion of the
*Judges as to whether he was right in thus leav- [497
ing the case to the jury, and also whether he was

right in receiving the register of shareholders in evidence under the circumstances, for the purpose above stated ; or whether further evidence of the transfer of the shares from Captain *Owen* to *Peter Hanstock* was necessary to support the conviction.

On the 29th *May*, A. D. 1852, this case was argued before Lord CAMPBELL C. J., ALDERSON B., MAULE J., CRESSWELL J., and ERLE J.

Ballantine, for the Crown.

Keane and *Cole*, for the prisoner.

Keane. There are two questions for the consideration of the Court. First, as to the evidence ; second, as to the direction of the Recorder. It was thought right to offer evidence that *Hanstock* was a shareholder, and the register of the shareholders, used for the purposes of the company, was tendered in evidence as sufficient for that purpose. But it is submitted that it was not sufficient. Even if properly proved, the register would not shew that *Hanstock* was a person whom the company would treat as a person entitled to deal with the shares, to receive the dividends payable on them, or to transfer them ; 8 & 9 *Vict.* c. 16, ss. 8, 9, 14, 25, 122. It was therefore wrongly received by the learned Recorder.

ALDERSON B.—*Hanstock* was the registered proprietor ; the effect of the forgery is to take him off the register.

Keane. The object of the evidence was to shew that *Hanstock* had a right to receive the dividends.

Lord CAMPBELL C. J.—It was evidence to shew an intent to defraud. Was not the register under the seal of the company evidence to shew that *Hanstock* was on the register ?

Keane. It should have been proved to be the register duly authenticated at a meeting of the company.

*498] *CRESSWELL J.—Was it not evidence to prove as much as was necessary to have sustained the—

indictment? Though the Recorder may have directed the jury that it was evidence of two or three things, if it proved what is necessary, and does not prove the other things, is not that enough? If A. B. C. and D. are points which, in the opinion of the Recorder, may be established by the production of the register, and the production of it will establish A., which is all that is necessary to sustain the indictment, can we say that the register is not admissible in evidence because the production does not also establish B. C. and D.?

Lord CAMPBELL C. J.—Was not there evidence to shew that there was an intent to defraud, and might not the jury infer that there was an intent to defraud *Hanstock*?

Keane. The register does not establish *Hanstock's* title.

Lord CAMPBELL C. J.—The register was part of *Hanstock's* title, if his name was on it. The fraudulent act of the prisoner tended to injure that part of *Hanstock's* title; the register was admissible to shew that the act of the prisoner might have had that effect. A complete title in *Hanstock* was not necessary in order that he should be defrauded in respect of something which was a step to a complete title. It is quite obvious that the evidence was properly received.

Keane. It is submitted that the mere production of the register is not proof that *Hanstock's* name was on the register of shareholders. The book, it is true, was produced, and the act says that on the bare production of it, it shall be admissible in evidence; but the act refers to actions for calls, and it is submitted that it does not make the register *prima facie* evidence in a criminal case. It was produced with a seal; but there was no authentication of the seal.

CRESSWELL J.—The Recorder does not say that the
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*499] *seal was the only evidence to shew that the book was the register of the company. He says, *it was* the register.

LORD CAMPBELL C. J.—We must assume that the register was in evidence.

ALDERSON B.—That question is not reserved. The question now is, was the register rightly used?

Keane. The Recorder told the jury that *Hanstock* would be the person to whom the dividends, if any, would be legally payable. That was a clear misdirection; for *Hanstock* was not shewn to be a shareholder within the meaning of the act, and so he could not be entitled to receive dividends. In other respects the learned Recorder seems to have adopted the words of CRESSWELL J. in *Reg. v. Marcus*, 2 Car. & K. 358.

ALDERSON B.—*Hanstock's* name was on the register, surely that was some advantage.

MAULE J.—The Recorder seems to have thought that in order to prove an intent to defraud there should have been some person defrauded, or who might possibly have been defrauded. But I do not think that at all necessary. A man may have an intent to defraud, and yet there may not be any person who could be defrauded by his act. Suppose a person with a good account at his bankers, and a friend, with his knowledge, forges his name to a cheque either to try his credit, or to imitate his handwriting, there would be no *intent* to defraud, though there would be parties who might be defrauded; but where another person has no account at his bankers, but a man *supposes* that he has, and on that supposition forges his name, there would be an intent to defraud in that case, although no person could be defrauded.

Ballantine, for the Crown.

The register is kept under the provisions of 8 & 9 Vict. c. 16, s. 9.

Lord CAMPBELL C. J.—The register would at least *be *primâ facie* evidence in *Hanstock's* favour [*500 when he came for his dividends. The forgery deprives him of the *primâ facie* evidence, to shew that he was entitled to the dividends.

ALDERSON B.—If that be taken away it is enough to sustain the indictment.

Ballantine. The register was a *step towards a title*, and that it is submitted is enough.

MAULE J.—You say that it is sufficient if it gives some colour of title.

Ballantine. The prisoner has by the forgery *admitted* that *Hanstock* was entitled to the shares and dividends. The effect of the forgery would have been to deprive him of them, and therefore there must have been in the forging and uttering an intent to defraud. The Recorder, therefore, was entitled, as against the prisoner to say that *Hanstock* was the person entitled by law to receive any dividends that might become payable. It may have been incorrect to say, without qualification, that *Hanstock* was entitled to the dividends; but if complete evidence of *Hanstock's* title was not necessary, and an inchoate title was sufficient, then the direction of the Recorder was right. Beside, though *Hanstock* may not have been entitled to receive the dividends for his own purposes, he was entitled to receive them as the trustee of Captain *Owen*.

MAULE J.—This man might have been convicted, though *Hanstock's* name was not on the register. There may be an *intent* to defraud without the power or the opportunity to defraud; though the Recorder seems to think that in order to convict a man of an intent to defraud, there must be somebody who could be defrauded.

ALDERSON B.—If the jury believed that the prisoner *thought* that *Hanstock* was entitled to the dividends, that

would be enough. The question is, as put by my
 *501] *Brother MAULE, what was the prisoner's *intent*
 when he attested the transfer of the shares?

Ballantine. The jury have found beyond all question that the prisoner's intent was to defraud. With respect to the title of *Hanstock* to the dividends, there is a great deal of difference between what would be enough to establish it *against a wrong doer*, and against another party. Before the new statute, (a) it was necessary to shew that there was an intent to defraud some particular person. It was then the constant practice, in the case of a partnership, to allege an intent to defraud *A. B.* and others; the partnership deed was never called for, and it was frequently ruled by the Judges that if the parties were seen and known to have acted together as partners that was sufficient, and the Judge would have told the jury that there was evidence that they would have been the parties to be defrauded.

MAULE J.—The Recorder says, in the case submitted to us, it was further objected that it was necessary that *Hanstock's* title should be shown, and that the transfer from Captain *Owen* to him should be proved for that purpose, but he overruled that objection. The Recorder was right in that; but his observations to the jury are not altogether correct, because they proceed on the supposition that in order to justify a jury in finding an intent
 *502] to defraud, there *must be somebody to be defrauded, and that seems to have led him to the

(a) 14 & 15 Vict. c. 100, s. 8. From and after the coming of this act into operation it shall be sufficient in *any indictment for forging, uttering, offering, disposing of, or putting off* any instrument whatsoever, or for obtaining or attempting to obtain any property by false pretences, to allege that the defendant did the act *with intent to defraud, without alleging the intent of the defendant to be to defraud any particular person*; and on the trial of any of the offences in this section mentioned it shall not be necessary to prove an intent on the part of the defendant *to defraud any particular person*, but it shall be sufficient to prove that the defendant did the act charged *with an intent to defraud*.

opposite error in saying that *Hanstock* was the person entitled to the dividends (if any).

Ballatine. It is submitted that the Recorder rightly overruled the objections, and that his direction to the jury in everything necessary to sustain the indictment was correct.

Keane replied.

The ownership of the shares was in Captain *Owen*. The transfer to *Hanstock* was bad, because there was no consideration for it, and the statute requires a consideration.

LORD CAMPBELL C. J.—We are all of opinion that the prisoner was properly convicted; and that the register was properly admitted in evidence, and that is the question which the learned Recorder has left to us. With respect to the Recorder's direction to the jury, it seems to me that he did not leave it to them to find a verdict, on the ground that the evidence of *Hanstock's* title was complete, but that as far as the prisoner was concerned it was sufficiently established.

ALDERSON B.—I think the Recorder must be taken to have told the jury that if *Hanstock* had the legal title, though *Owen* was in fact the real owner of the shares, *Hanstock's* title was capable of being injured by the forgery.

MAULE J.—We are called upon to decide whether the Recorder rightly disposed of the objections made at the trial. The register of the company was tendered in evidence, and the Recorder rightly overruled the objection made to its admissibility. Then it was said that it was necessary that the title of *Hanstock* should be shewn, and that the transfer from Captain *Owen* to him should be proved. The Recorder was perfectly right in overruling that objection. His observation afterwards, that *Hanstock* was entitled to *the dividends, seems to [*503

have been grounded on the supposition that in order to convict a prisoner of an intent to defraud, there must be somebody to be defrauded or hurt in some way; but it is not necessary that any person should be in a situation to be defrauded. If the Recorder had been set right upon that point, it would have been so much the worse for the prisoner; for the only chance the prisoner had to get off was the belief of the jury that he could not be convicted unless he intended to defraud somebody in particular, and that to have *intended* to defraud was not enough.

CRESSWELL J.—With regard to the register, I am of opinion that it was properly received in evidence, it being under the common seal of the company, and kept pursuant to the act of Parliament; and that, it appearing from the register that *Hanstock* was a shareholder, for the purpose of sustaining this indictment, it was unnecessary that *Hanstock's* title should be further gone into. I think the substantial meaning of what the Recorder said to the jury was this, though it is not necessary to shew an intent to defraud any particular individual, there must be somebody to be defrauded, and that there were several parties who might have been defrauded. The case of *Reg v. Marcus*,^(a) was decided before the recent act of Parliament; there were three counts in the indictment, and there was no proof that anybody was defrauded or could by possibility, be defrauded. It then became necessary to consider the rule of law that you may impute to a man the necessary consequences of his act; and there being no ground for supposing that there was an intent to defraud any person, the prisoner was acquitted.

ERLE J.—As to the first question, the register was, in my opinion, rightly admitted in evidence. As to the

(a) 2 Car. & K. 358.

*second, I take it to be, had *Hanstock* such an interest in the share as to make him a subject to be defrauded? Of this I entertain no doubt. [*504

ANN LAVEY v. THE QUEEN. 1851(a).

In an indictment for perjury it was alleged, that "in the *Whitechapel* County Court of *Middlesex*, holden at, &c., in the county of *Middlesex*, before *J. M.*, then and there being the Judge of the said Court, a certain action of contract then pending in the said Court between *A. L.*, plaintiff, and *R. H.*, defendant, came on to be tried," &c., upon which said trial *A. L.* was then and there duly sworn, &c., "before the said *J. M.*, then and there being Judge of the Court, and then and there having sufficient and competent authority to administer the said oath to the said *A. L.* in that behalf:" *Held*, 1. That it sufficiently appeared in the indictment that the Court in which the action was tried was held in pursuance of stat. 9 & 10 *Vict.* c. 95; 2ndly. That from the averment of competent authority in the Judge to administer the oath, it sufficiently appeared that the judicial proceeding in the course of which the oath was administered was one over which the Judge had jurisdiction.

WRIT of Error in Exchequer Chamber from the Queen's Bench. The indictment which had been found at the *Central Criminal Court* was removed by *certiorari* into the Queen's Bench at the instance of the defendant. It set forth that "on 9th *April*, 1850, in the *Whitechapel* County Court of *Middlesex*, holden at the Court-house in *Osborn Street, Whitechapel*, in the Parish of *St. Mary, Whitechapel*, in the county of *Middlesex*, and within the jurisdiction of the said *Central Criminal Court*, before *James Manning*, Serjeant-at-Law, then and there being the Judge of the said Court, a certain action of contract then pending in the said Court between *Ann Lavey* suing as widow and executrix of the last will and testament of *Hyam Lavey* deceased, plaintiff, and *Robert Hannah*, defendant, came on to be tried, and was then and there in

(a) A writ of error to the House of Lords was sued out in this case; but as it has not been followed up, the case is here reported. See p. 512.

due form of law heard and tried, by and before the said *James Manning*, then and there being Judge of the said County Court as aforesaid." Upon which said hearing and trial the *said *Ann Lavey*, of and in the county *505] of *Middlesex*, and within the jurisdiction of the said *Central Criminal Court*, widow, tendered herself as a witness in her own behalf, and was then and there within the jurisdiction of the said *Central Criminal Court*, duly sworn, and took her corporal oath before the said *James Manning*, then and there being Judge of the said Court as aforesaid, and then and there having sufficient and competent authority to administer the said oath to her the said *Ann Lavey* in that behalf, that the evidence which the said *Ann Lavey* should give to the Court then and there touching the matter then and there in question between her, the said *Ann Lavey*, and the said *Robert Hannah*, should be the truth, the whole truth, and nothing but the truth: that at and upon the said trial and hearing of the said action as aforesaid, it then and there became and was a material question in the said action, whether she the said *Ann Lavey* had ever been tried at the said *Central Criminal Court* for any offence whatever and whether the said *Ann Lavey* had ever been in custody at the *Thames Police Station* at *Stepney*, in the said county of *Middlesex*, charged with any offence whatever. Averment, that the defendant swore that she had never been tried at the said *Central Criminal Court* for any offence whatever, &c., and assignment of perjury thereon.

Plea not guilty.

On the trial before Lord CAMPBELL C. J., at the sittings at *Westminster* after *Hilary Term*, A. D. 1851, the defendant was found guilty and sentenced to be imprisoned for twelve calendar months. On this judgment a writ of error was brought, which was argued on the 18th of

June, A. D. 1851, in the *Exchequer* Chamber before PARKE B., MAULE J., CRESSWELL J., and MARTIN B. [*506

**Willes*, for the prisoner, plaintiff in error.

Pendergast and *Gifford*, for the Queen, defendant in error.

Willes. The County Court is wrongly described as "the *Whitechapel* County Court of *Middlesex*, holden at the Court house in *Osborn Street, Whitechapel*, in the parish of *St. Mary, Whitechapel*, in the county of *Middlesex*." The description ought to have been "the County Court of *Middlesex* holden at *Whitechapel*, in the county of *Middlesex*, in pursuance of stat. 9 & 10 *Vict. c. 95*."

CRESSWELL J.—Is the order in council which, by section 3, the Queen is empowered to issue, and which gives the description of the several County Court districts, made part of the statute?

PARKE B.—May we not reject the word "*Whitechapel*" as insensible?

Willes. No; for then the description would be applicable to the old County Court, in which the suitors were the judges. Here the proceedings are said to have been before the Judge.

PARKE B.—Does not that shew that the Court was a County Court, constituted under the act of Parliament?

Willes. The record ought to shew that the proceeding was in a Court held under some lawful authority. Again, it does not appear from the allegation, "a certain action on contract then pending in the said Court," that the County Court had power to try the action. If there is any cause of action answering the description in this allegation which could be without the jurisdiction of the County Court, that is a sufficient objection to the indictment. In *Reg. v. Ewington*, 2 Moo. C. C. 223, it is submitted that there ought to have been an allegation that the action was within the jurisdiction of the County

*507] Court. Though the County *Court has power to inquire whether it has jurisdiction in any case, that is a special jurisdiction, and the indictment should aver explicitly or implicitly that the Court had jurisdiction to make the inquiry in which the perjury was committed; and therefore the allegation, "before the said *James Manning*, then and there being Judge of the said Court as aforesaid, and then and there having sufficient and competent authority to administer the said oath," is not sufficient. In *Reg. v. Overton*, 4 Q. B. 83, which was an indictment for perjury on an appeal before commissioners of taxes, the nature of the appeal was not stated; but there was an averment, "the said Commissioners then and there having authority to administer the said oath;" and it was held, that the necessity for shewing distinctly that the false oath was taken in a judicial proceeding was not dispensed with by the stat. 23 Geo. 2, c. 11, s. 1.

MAULE J.—That statute specifies the particulars which it means to dispense with.

PARKE B.—The case of *Reg. v. Overton*, does not decide that the indictment must aver that the oath was administered in a judicial proceeding over which the Court had jurisdiction; but that it must be averred to be in a judicial proceeding; *Ryalls v. Reg.* 18 L. J. M. C. 69. Suppose an indictment alleging that perjury had been committed in the Queen's Bench?

Willes. The jurisdiction of the Judge of a superior Court is presumed; but it is not so in the case of an inferior Court. In 3 *Inst.* 166, it is said, "Where the Court hath no authority to hold plea of the cause, but it is *coram non iudice*, there perjury cannot be committed." In *Buxton v. Gouch*, 3 Salk. 269, 270, it was said by the Court, "a false oath formerly taken in the Court of Re-

quests, in a matter concerning lands, was not indictable, because that Court had no jurisdiction in such cases."

*CRESSWELL J.—Does not the averment, that the Judge of the Court had sufficient and competent authority to administer the oath, by implication aver that the matter was within the jurisdiction of the Court. [*508

Willes. It is uncertain whether the oath was administered by the proper officers of the Court or person authorized to administer the oath, or under such circumstances as would authorize the administering of the oath. No fact necessary to the jurisdiction of the Judge to administer the oath is involved. It does not appear whether the evidence of the defendant was given by her in the *Whitechapel* County Court or in the *Central Criminal Court*: both those Courts are mentioned in the indictment. Nor does the statement, that the defendant was sworn and took her oath, shew in what Court the oath was taken. Lastly, the indictment does not shew the materiality of the questions upon which the perjury is assigned.

MAULE J.—They are averred to be material. It is for you to shew that it is impossible that they could be material questions.

Prendergast. It is unnecessary to set out the order in council by which the County Court of *Middlesex*, held under stat. 23 *Geo.* 2, c. 33, was, in pursuance of sect. 3 of stat. 9 & 10 *Vict.* c. 95, ordered to be holden as a County Court under that act. It might as well be objected to an indictment for perjury committed at the quarter sessions, that the commission of the justices was not set out. By sect. 9 of stat. 9 & 10 *Vict.* c. 95, the Lord Chancellor was directed to appoint Judges of the County Courts established under that act. And the stat. 23 *Geo.* 2, c. 11, s. 1, declares it unnecessary to set forth the commission

on the authority of the Court. It is sufficient to allege generally that a cause was pending and came on to be tried in due form; *Rex v. Dowling*, 5 T. R. 311; 1 Stark. Cr. Pl. 114. In *Reg. v. Overton*, 4 Q. B. 83, it did not *509] *appear that the oath was taken in a judicial proceeding. Here it is not contended that the proceeding in the course of which the oath was administered, was not judicial. In *Reg. v. Ervington*, 2 Moo. C. C. 223, the Commissioner had only a special authority. That the Judge or officer had authority to administer the oath is matter of proof. Lastly, it is expressly shewn that the proceeding, in the course of which the evidence was given by the defendant, took place in the County Court, before Serjeant *Manning*, who is stated to be Judge of the County Court; 2 Stark. Cr. Pl. 543—546. He was then stopped by the Court.

Willes, in reply, cited *Read v. Pope*, 1 Cr. M. & R. 302.

Cur. adv. vult.

On the 28th *June* A. D. 1851, the judgment of the Court was given by PARKE B.(a)

Two principal objections were taken to this indictment. The first was, that the Court in which the proceedings took place, in the course of which the perjury was committed, was not alleged to be properly constituted. We intimated our opinion in the course of the argument, that that objection ought not to prevail. We think it does sufficiently appear that the Court was held in pursuance of the 9 & 10 *Vict.* c. 95, for it is alleged to be a County Court, and held before a single Judge. The second objection was, that there was no averment that the action of contract stated in the indictment was one over which the County Court had jurisdiction; and, further, that no

(a) The other Judges present were, MAULE J., CRESSWELL J., and MARTIN B.

intendment can be made in favour of an inferior Court, that the action pending in it was one over which the Court had jurisdiction, and that if it had *not, then perjury could not have been committed in [*510 giving evidence in that cause. For the Crown it was contended, that the Court might have authority to put the question, and have it answered, although it had no jurisdiction over the cause; but even admitting that it was necessary that the suit must be cognizable by a County Court, in order to render the witness liable to an indictment for perjury, that there was a sufficient averment to lead to the implication that it was such a suit, in the averment that the Judge had "sufficient and competent authority to administer the said oath," for that he would have no such authority, except on the supposition that the Court had jurisdiction over the suit; that it was necessary that he should have such jurisdiction in order to make the oath binding, and that it would not be binding, unless that very oath was administered in the course of such a suit; and that the meaning of the averment of authority to administer the oath was, that it was administered by such a person, and in such a proceeding, as to make that oath valid and binding. For the plaintiff in error, it was argued, that it was not enough to make that averment, but that the statute 23 *Geo.* 2, c. 11, s. 1, required something more; and that in setting forth the substance of the offence, it was not enough to set out the substance of the matter sworn to, and aver that it was false, and to allege the authority of the Judge to administer the oath, and to shew expressly, or by implication, that the matter deposed to was material; but that it must be shewn, by an independent averment, that the oath was administered in a judicial proceeding, of which the Court had cognizance, and for that the judgment of the Court of Queen's Bench, delivered by Lord *Denman*,

C. J., in *Reg. v. Overton*, 4 Q. B. 83, was cited. If it were necessary for us to say how we *should decide the present case, if it were not distinguishable from that, we should require further time for consideration; but in this case it is expressly averred, that an action was pending in the County Court, presided over by the Judge who administered the oath, and that such action was one of contract, a species of action of which the County Court may have cognizance; that the case came on to be tried before him; that upon the hearing the plaintiff in error tendered herself as a witness, and was sworn before the Judge; and then follows the averment of a competency of authority in that Judge to administer the oath. It appears, therefore, on the present record, that the oath was administered in the course of a judicial proceeding, whereas, in the case of *Reg. v. Overton*, the Court considered that there was no averment that the oath was administered in the course of any judicial proceeding. Here the alleged defect is, that although it was administered in a judicial proceeding, it does not appear expressly that it was one of which the Judge who administered it had cognizance. We think it does so appear by necessary implication, for, unless he had, he could not have had power to administer the oath, so as to be valid and binding, which is the true meaning of the phrase. We therefore think, in this case, that the alleged defect in the averment of the substance of the charge is supplied by necessary implication, by the averment of the competency of authority in the Judge to administer the oath; and we must infer that it was proved at the trial that he had lawful jurisdiction over the proceedings. Also it was shewn sufficiently upon the averment in the indictment that the matter deposed to was false, and was material. Therefore the judgment must be affirmed.

NOTE.

*The following is the form of the *præcipe* and petition, with the Secretary of State's fiat, necessary when a writ of error to the House of Lords is sued out :—

Writ of error, returnable in Parliament immediately for *Ann Lavey* against *The Queen*, from judgment affirmed in Exchequer Chamber to House of Lords on judgment on indictment for perjury.

L. & L.

Address.

26th June, 1851.

To the Queen's most excellent Majesty.

The humble petition of *Ann Lavey*, of *Shadwell*, in the county of *Middlesex*, widow, Sheweth,

That your petitioner was indicted at the *Central Criminal Court* for perjury, and which indictment she caused to be removed by writ of *certiorari* into the Queen's Bench at *Westminster*.

That at the sittings after *Hilary* Term last she was tried and found guilty, and received sentence of twelve months imprisonment.

That your petitioner feeling aggrieved by such judgment, caused a writ of error to be sued out, returnable in your Majesty's Court of Exchequer Chamber.

That your petitioner duly assigned errors, and the same came on for argument at the sittings after the last *Trinity* Term.

That the Judges who formed such Court, after argument, as well for your petitioner as for your Majesty, adjourned giving judgment until time had been taken to consider the same.

That on the 20th of *June*, 1851, the said Court of Exchequer Chamber gave judgment against your petitioner.

That your petitioner is advised that there is manifest error in such judgment, and that she is in no way relievable but by bringing a writ of error returnable in Parliament.

Your petitioner therefore most humbly prays your Majesty to grant her leave to bring and prosecute a writ of error returnable in your Majesty's High Court of Parliament.

And your petitioner will ever pray, &c.

Whitehall, June 23rd 1851.

Her Majesty is graciously pleased to allow the petitioner to bring and prosecute a writ of error as in the petition is humbly prayed.

G. Grey.

Indorsed *Lavey v. The Queen*. Petition for writ of error to Parliament.

(Attorney's name).

£2 2s. 6d. fee, Secretary of State's Office.

***518] *REGINA v. MATHEW SCAIFE AND THOMAS ROOKE.**

A Judge of either of the superior Courts, sitting at Chambers, has power under 1 & 2 Vict. c. 45, s. 1, to issue a *procedendo*.

It is in the discretion of the Judge, when an application is made by the Crown to have the record of an indictment for felony removed by *certiorari* into the Queen's Bench at the instance of the defendants, remitted by *procedendo* to the original jurisdiction, whether he will make a conditional order, and summon the defendants to shew cause against it, or make the order absolute in the first instance without summoning the parties.

Semble, that where the defendants neglect to take down the record and give due notice of trial, a *procedendo* will be granted.

A NEW trial in this case—which was an indictment for felony removed by *certiorari* from the Quarter Sessions at *Kingston-upon-Hull*, and tried before CRESSWELL J., at *York*—was granted by the Court of Queen's Bench on the 2nd *June*, A. D. 1851. (a) At the Summer Assizes held at *York*, on the 8th *July* following before PLATT B., the prisoners at their own cost and expense took down the record and appeared at the bar to take their trial; but on the application of the prosecution on the ground that a material witness was absent, the case was postponed to the next Spring Assizes, and the prisoners, on giving fresh bail, were set at liberty. At the Spring Assizes held at *York*, 8th *March*, A. D. 1852, before ALDERSON B., the prisoners appeared in Court and made an application to be put upon their trial; but they having neglected to bring down the record, the learned Judge was unable to accede to their application. On the 17th *March* following, an application was made on behalf of the Crown to POLLOCK C. B., at Chambers, for a writ of *procedendo* to take back the indictment from the Queen's Bench to the quarter sessions for *Kingston-upon-Hull*; and on the 30th of the

(a) See *ante*, p. 281.

same month a writ of *procedendo* was issued upon
 *the order of the Lord Chief Baron, and the re- [*514
 cord was remitted to the original jurisdiction. (a)

The prisoners in explanation of their default in not bringing down the record, in their affidavit, make the following statement:—"And these deponents further severally say, that such postponement as well as the motion for the new trial, and procuring bail, as aforesaid, was attended with very great cost and expense to these deponents, and their relatives, particularly as these deponents were under the necessity of changing their attorneys who respectively acted in conducting their defence no less than three times during its progress. And these depo-

(a) The application to the Lord Chief Baron was grounded upon the affidavit of the attorney for the prosecution, which set forth, that not having received the usual notice of trial from the defendants, prior to the last Spring Assizes, he caused a rule to be served upon the defendants calling upon them to try the issue on this prosecution at the then next assizes to be held at *York*, together with a notice that he was ready and willing to waive any objection to such want of notice of trial, and to accept *short notice of trial*; and further, that if the defendants should neglect to give such short notice of trial, an application would be made for a writ of *procedendo* to bring back the indictment for trial at the next quarter sessions for the borough of *Kington-upon-Hull*. The affidavit then set forth that the deponent received *no notice of trial whatever*, and that on the 12th day of *March*, 1852, search was made on behalf of the prosecution at the office of the under-sheriff of *Yorkshire* at *York* for the entry of any *venire* and *istringas* to the sheriff to empanel a jury for the trial of the said indictment at the assizes then being held in *York*, but that no such entry appeared in the books of the said office. The Lord Chief Baron, upon these facts, issued the following summons, a copy of which was served upon the agent of the *former* attorney for the defendants:—

[L. S.] THE QUEEN on the prosecution of AN- DREW MACMANUS v. MATTHEW SCAIFE and THOMAS ROOKE.	"Let the defendant's attorney or agent attend me at my Chambers <i>Tuesday</i> and <i>Wednesday</i> next, at eleven of the clock in the forenoon, to shew cause why a writ of <i>pro- cedendo</i> should not issue to take back the indictment from the Queen's Bench to the quarter sessions for <i>Kington- upon-Hull</i>. "Dated this 17th day of <i>March</i>, 1852. FRED. POLLOCK."
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No cause having been shewn, the Lord Chief Baron ordered the *procedendo* to issue.

nents further severally say, that they had no means and were unable to procure any, for the *purpose of
*515] paying their attorney to take the necessary steps for bringing down the record and proceeding to trial at the said last mentioned Assizes, and those deponents were under the impression that if they appeared and surrendered to take their trial no other proceeding on their part would be required." The prisoners returned from *York* home to *Kingston-upon-Hull*, where they were apprehended and committed to the borough gaol on the 1st of *April* following. The affidavit of their attorney stated that on the 3rd of *April* last he was instructed to appear for the prisoners at the Police Court of the said borough, who were then in custody for felony, and stood charged before two of Her Majesty's justices acting for the said borough; that he appeared before said justices, when, without hearing any evidence whatever, the said two prisoners were committed for trial before the Recorder for the said borough (*Granger* Q. C.) who was then holding his Court in the said borough for the trial of criminal offences; that he was informed by the clerk of said justices that said two prisoners had been arrested on a bench warrant issued by said Recorder, and that they were arrested in consequence of their not having taken a bill of indictment for felony down to the preceding *York* Spring Assizes for trial pursuant to recognizances entered into by them : " that an application for the postponement of the trial, on the ground that the defence of such trial required very particular preparation, and also the attendance of several witnesses, was made on *Monday* the 5th *April* last, but was refused by the said Recorder, and that said prisoners were found guilty, and were each sentenced to ten years' transportation.

Dearly, in Trinity Term, A. D. 1852, moved the Queen's Bench for a rule *nisi* to shew cause why the writ of *pro-*

cedendo issued by the Lord Chief Baron at *Chambers in vacation should not be set aside, and all the proceedings consequent thereon in the Court below treated as a nullity. The grounds for the rule were, 1st, that the Lord Chief Baron had no jurisdiction to issue the writ, and, 2dly, that supposing there were jurisdiction, the prisoners were not summoned to shew cause. At common law, when once a record was removed by *certiorari* from the inferior jurisdiction into the Court of Queen's Bench, and was filed and entered of record, there was no power to send it back. This was clear from 4th *Inst.*, p. 73, where it was said, "And so supreme is the jurisdiction of this Court, that if any record be removed into this Court, it cannot (being as it were in his centre) be remanded back again, unless it be by act of Parliament. And this appeareth by the judgment of the Parliament in *anno* 6, *Hen.* 8; but by the authority of that act indictments of felonies and murders removed into the King's Bench may, by the justices of that Court, be remanded, and this Court may send down as well the bodies of all felons and murderers as their indictments into the counties where the same murders or felonies were committed or done, &c., in such manner as if the indictments had not been brought into the King's Bench. But the justices of the King's Bench, of their own authority, may grant a *nisi prius*, in case of treason, felony, and other pleas; for they send but the transcript of the record, and not the record itself, as shall be said in the chapter of justices of *nisi prius*. But if the justices of the King's Bench do perceive that any indictment is to be removed into that Court by practice or for delay, the Court may refuse to receive the same before it be entered of record, and remand the same back again for justice to be done." It was agreed by the Court of King's Bench,

*517] in the case of *The King v. Whitlow*, Hil., 6 Geo. 1, that by *the common law, if a *certiorari* be once filed, the proceedings below can never be revived by any *procedendo*; 2 *Hawk. P. C.*, c. 27, s. 68. If the *certiorari* had been unlawfully obtained,—which was not suggested here,—it might be taken off the file; *Rex v. Wakefield*, 1 Burr. 488. In that case it was said, “We are all of opinion that the writ of *certiorari* be superseded (*quia improvidé emanavit*), the return taken off the file. and the order remanded;” *Rex v. Eliz. Nicholls*, Pas. 18 Geo. 2, B. R., and *Rex v. Govers*, Pas. 28 Geo. 2, B. R., are there referred to. And in the case of *Rex v. Clace*, 4 Burr. 2456, the Court said, “As this *certiorari* is filed, the proper previous motion to this motion for a *procedendo* would have been *to take the certiorari off the file*,” for you cannot move for a *procedendo* while it is upon the file here. Numberless authorities might be cited to shew that at common law the Court possessed no power to send back a record when once on the file of the Court. The statute of 6 Hen. 8, c. 6, doubtless gave the justices of the bench power to send the record back in cases of “felony and murder” to the inferior Court. It is necessary to look closely at the wording of the statute. “Be it therefore ordained that the justices of the King’s Bench for the time being have full authority and power by their discretions to remand and send down, as well the bodies of all felons and murderers brought or removed, or that shall be brought or removed, before the King in his Bench, as well their indictments into the counties where the same matters or felonies have been committed or done, and to command all justices of gaol delivery, justices of peace, and all other justices and commissioners, and every of them to proceed and determine upon all the aforesaid bodies and indictments so

removed after the course of the common law, &c.” Under this statute *the justices of the Queen’s Bench in their discretions had power to remit the record, after it was filed, to the inferior Court; but it is contended, that it is a power given to the full Court, and cannot be exercised by a single Judge at Chambers. [*518]

ERLE J.—Every Judge in *Westminster Hall* acts as a Judge of each of the three superior Courts when sitting at Chambers. He exercises these powers under 11 *Geo.* 4, & 1 *Wm.* 4, c. 70, s. 4, and 1 & 2 *Vict.* c. 45, s. 1. You cannot, therefore, stand on the authority of the passage in *Coke’s Institutes*.

Dearsly. Many cases and authorities might be cited to shew that where a statute clothes the Court with a power it did not possess at common law, that it cannot be exercised by a single Judge; *Morgan v. Lute*, 1 Chit. Rep. 381; *Shaw v. Roberts*, 2 Dowl. 25; *Jones v. Fitzadams*, 3 Dowl. 111; *Geach v. Goppen*, 2 Dowl. 74; *Lander v. Gordon*, 7 M. & W. 218. It now becomes important to see what are the powers conferred by statute on a Judge at Chambers. By the 11 *Geo.* 4, and 1 *Wm.* 4, c. 70, s. 4, every Judge is authorized to transact such business at Chambers or elsewhere depending in any of the superior Courts (as relates to matters over which the said Courts have a common jurisdiction), as may according to the course and practice of the Court, be transacted by a single Judge. By the 1 & 2 *Vict.* c. 45, s. 1, every Judge of the superior Courts is authorized “to transact out of Court such business as may, according to the course and practice of the Court, be so transacted by a single Judge. It is contended that under neither of these statutes is there the power given to a single Judge at Chambers to issue a writ of *procedendo*. There being, therefore, no power at common law to remit the record, it rests entirely upon the statute of *Hen.* 8, and it is sub-

*519] mitted that this statute confers *the power upon the *full Court*, and that the statutes relating to the Judge at Chambers in nowise authorizes a single Judge at Chambers to issue a *procedendo* after it is once filed and entered of record. But it is contended, that even supposing the Court should be of opinion that the Lord Chief Baron had jurisdiction to issue the writ, still that the prisoners should have been summoned to shew cause, which the affidavits shew was not done. In *Corner's Cr. Prac.* it is laid down, that if the application be made to the Court it must be for a rule *nisi*; and if to a single Judge, by a summons. In this case the Lord Chief Baron did not hear the parties, neither were they summoned. Upon both of these grounds, or upon either, it is submitted that the Court will grant a rule *nisi*.

LORD CAMPBELL C. J.—No ground has been laid for this motion. The contention has been that a single Judge sitting at Chambers had no right to make this order, and that involves the real question whether there is a distinction between a Judge of this Court and a Judge of any other Court, exercising the jurisdiction which the Lord Chief Baron in this case, did, in fact, exercise. Then, has a Judge of this Court authority to make an order such as that complained of, according to the course and practice of this Court? If he has, a like power is given by 1 *Vict.* c. 45, to the Judge of any other Court sitting as a Judge of this Court. I have no doubt that a Judge of this Court has the jurisdiction, subject always to the review, affirmation, or the rescinding of what he may do by this Court. What a Judge may so do may be embodied in a rule of this Court, and in like manner the order of the Chief Baron in this case may be made a rule of this Court. Such a practice appears to prevail, and the power which is exercised thereby seems to have been most usefully confirmed by the statute 1 *Vict.* c. 45.

*Then there is no ground for saying that the power has not been properly exercised. There [520 was an order for a *procedendo*, and a new trial, which we must suppose to have been properly conducted, and if the conviction is not satisfactory to the prisoner, then application should be made, not here, but to another authority, with a view to the exercise of the clemency of the Crown.

COLERIDGE J.—The effect of the statute was to make the Lord Chief Baron a Judge of this Court, for the purpose of the application made to him, and looking at the course and practice of this Court, we can have no doubt that a Judge of this Court might have done what the Chief Baron did. The course and practice of the Court we know from the best authority—that of the Masters of the Crown Office and the experience of every one of us. I have often directed *certiorari* and a *procedendo* to issue. Then it is said that there ought to have been a summons to shew cause before the *procedendo* issued. Surely that is entirely and properly in the discretion of the Judge. As to the other point, I agree that nothing can be done for the prisoners here. They are detained under the judgment of a Court of Record, and they must apply to the Crown, which alone can assist them.

ERLE J.—The question of jurisdiction is different from that of discretion, and I say this because I will not presume to sit in judgment on those who, by law, are required to exercise a discretion. Then, has a Judge at Chambers jurisdiction in such a case as this? I see no distinction between an inferior Court when treating a case of felony, and when treating any other proceeding therein; so far as the course and practice of this Court in respect of the power to remove indictments or to order that they be proceeded with is concerned, I think the facts show that this case is not within that class of statutes in

*521] which power is given sometimes to *the Court exclusively, and sometimes to a Judge exclusively ; but that is quite an ordinary case according to the practice of this Court, which a Judge, as the delegate of the Court, may deal with at Chambers.

CROMPTON J.—There is no ground for interfering in this case. To say that the Lord Chief Baron had no jurisdiction is quite unfounded, for the general power of a Judge of this Court to act in such matters as this at Chambers is not affected by the statute, and I agree with my Brother ERLE that the statute is not one which expressly excludes the authority either of the Court or of a single Judge. The question of the summons was necessarily within the discretion of the Judge on his notion of what the facts disclosed to him required. It is not for us to say whether there has been any hardship because the remedy must be sought elsewhere.

*522] *REGINA v. HANNAH MOORE.

The wife of a person in whose house an offence is committed, such person not being prosecutor, nor engaged in the apprehension, prosecution, or examination of the offender, and the offence not being in any way connected with the management of the house, is not a person in authority within the rule which excludes confessions.

THE prisoner was tried at the last Assizes for *Sussex* before PARKE B., on the coroner's inquisition, for wilful murder of her new born child. There was an indictment also against her for the same offence.

She was found guilty of the misdemeanor of concealing the birth of her child.

There was offered in evidence against her a confession made by her, in the presence of her mistress, to a surgeon who attending her, of her having strangled her child with a thread, and placed the dead body in a privy, where it

was found, with the thread round its neck. Her mistress had told her, before the surgeon came in, that "she had better speak the truth," and, in answer, she said she would tell it to the surgeon.

An objection was taken, that any subsequent confession was inadmissible. After consulting COLERIDGE J., his Lordship received the evidence, being of opinion that in this case her husband, not being the prosecutor, nor the offence in any way connected with the management of the house, the prisoner's mistress could not be considered as having any control over the prosecution so as to raise a presumption that the inducement held out by her would be likely to cause her to tell an untruth.

The prisoner was acquitted of the murder, because the jury believed that she was in such a state of mind that she did not know what she was about at the time.

The learned Baron, therefore requested the opinion of the Judges, whether the evidence was admissible.

On the 24th April, A. D. 1852, this case was argued *before POLLOCK C. B., PARKE B., ERLE J., WIL-
LIAMS J., and CROMPTON J. [*523

Creasy, for the prisoner.

The question for the Court is, whether the words "*she had better speak the truth*," spoken to the prisoner, a domestic servant, *by her mistress*, were such an inducement as to render the confession made by her inadmissible in evidence. In the case of *Reg. v. Garner*, 1 Den. C. C. 329, where a girl, thirteen years of age, who was indicted for administering poison to her mistress, with intent to murder her, and the surgeon, who attended the mistress, said to the prisoner, in the presence of her mistress, that "it would be better for her to speak the truth," the confession was excluded; but, it must be confessed, that a distinction may be taken between that case and this.

ERLE J.—As a universal rule an exhortation to tell the truth ought not to exclude a confession.

Creasy. Nor is the present case like the case of *Rex v. Upchurch*, R. & M., C. C. 465, because there the prisoner, a girl, had attempted to set fire to her master's house, and his wife, her mistress, who took part in the management of the house, said, "Mary, my girl, if you are guilty do confess; it will, perhaps, save your neck."

POLLOCK C. B.—Nor is the present case like the case of *Reg. v. Garner*, for there a domestic servant had attempted to murder her mistress, in whose presence the inducement was held out.

PARKE B.—The question is, whether an inducement held out by the wife of a person not being the prosecutor, and the offence not being connected with the management of the house, is sufficient to exclude the confession?

Creasy. In *Rex v. Kingston*, 4 Car. & P. 387, where, *524] on an indictment for administering arsenic, *it appeared that the surgeon who was called in, said to the prisoner, "You are under suspicion of this, and you had better tell all you know."

PARKE B.—That has nothing to do with the present case.

Creasy. All the cases are collected in *Gilham's case*, R. & M., C. C. 186, where a confession made in consequence of the exhortation of a clergyman was held to be admissible; and are also in *Joy on Confessions*. (*Rex v. Rowe*, R. & R. 153; *Reg. v. Taylor*, 8 Car. & P. 735; *Rex v. Simpson*, R. & M., C. C. 410.) In none of the cases where the inducement was held to exclude the confession, was the offence unconnected with the person, or property, or dwelling-house of the master and mistress, as in the present case; and the question is, can the Court extend the rule respecting persons in authority to the master and mistress of the person in whose house an

offence of this nature has been committed? But, it is submitted that the Court is not so much to inquire whether the inducement was held out by the prosecutor, as whether the person who held it out was *likely* to be the prosecutor? In criminal cases the Crown is the prosecutor, but the Crown is put in motion by private individuals, and a case occurred not very long ago where three persons were endeavouring to act the part of the prosecutor. The master and mistress of a house in which such an outrage had been committed, were most likely to become the prosecutors. If the test who was likely to be prosecutor be strictly applied, a married woman never would be bound over to prosecute. But who would be so likely to give information, as the master and mistress? What party would be more likely, considering the nature of the offence, to interfere than the mistress? Suppose the matter hushed up;—if the *master and mistress had been parties to the concealment of the offence, would they not have been [*525 guilty of misprision of felony? It is said that the offence has nothing to do with the management of the house. But who has so much authority over the mind of a maid-servant as her mistress? Is it not in the department of the wife to look after the morals of her female servants? We must not look at the case as lawyers, but consider what would be the natural result of an inducement by such a person. The test is not, it is submitted, who is the party to set justice in motion, but who is most likely to have influence? Who is it most natural that the prisoner should look to? The mistress, *qua* mistress is also said to be a person in authority. It is said by Mr. Pitt Taylor (1 P. Tayl. Ev. 587): “And first, as to the person by whom the inducement is offered. Here it is very clear that if the promise or threat be made by any one having authority over the prisoner, as for instance by

the prosecutor, the master or mistress of the prisoner, the constable, or other officer or person having him in custody, a magistrate or the like, the confession will be rejected as not being voluntary." In 2 *Russell on Crimes*, 839, it is observed—"With regard to the persons, whose inducements will prevent the admission of confessions, it should seem that all who are engaged in the apprehension, prosecution, or examination of a prisoner, are considered as persons of such authority, that their inducements will exclude any confession thereby obtained. Thus, an inducement held out by the prosecutor, or the prosecutor's wife, or his attorney, or by a constable, or the prosecutor in the apprehension or detention of the prisoner, or by a magistrate acting in the business, or other magistrate, or magistrate's clerk, or by a gaoler or *526] chaplain of a *gaol, or by a person having authority over the prisoner, as by the captain of a vessel to one of his crew, or by a master or mistress to a servant, or by a person having authority in the matter, or by a person in the presence of one in authority, with his assent, whether direct or implied, will be sufficient to exclude a confession made in consequence of such an inducement." *Rex v. Parratt*, 4 Car. & P. 570.

PARKE B.—*Russell* says, all who are *engaged in* the apprehension, prosecution, or examination of the prisoner.

Creasy referred to *Reg. v. Taylor*, 8 Car. & P. 733. Suppose an article stolen from an inmate in the house by a servant, would not the mistress have a presumable authority? The law in various ways recognises the authority of a master and mistress over their servants, inflicting heavier punishments upon servants guilty of larceny from their master or mistress, and formerly, in making the murder of either of them petty treason.

No person appeared as Counsel for the Crown.

Our. adv. vult.

On the 14th *June*, A. D. 1852, the following Judges being present, JERVIS C. J., PARKE B., ALDERSON B., MAULE J., CRESSWELL J., PLATT B., TALFOURD J., and MARTIN B., the following judgment was read by

PARKE B.(a)—The cases on this subject have gone quite far enough, and ought not to be extended.

It is admitted that confessions ought to be excluded unless voluntary, and *the Judge*, not the jury, ought to determine whether they are so.

One element in the consideration of this question as to their being voluntary is, whether the threat or inducement was such as to be likely to influence the prisoner. *Perhaps it would have been better to have held [527 (when it was determined that the *Judge* was to decide whether the confession was voluntary), that in all cases he was to decide that point upon his own view of *all* the circumstances, including the nature of the threat or inducement, and the character of the person holding it out together, not necessarily excluding the confession on account of the character of the person holding out the inducement or threat.

But a rule has been laid down in different precedents by which we are bound, and that is, that if the threat or inducement is held out actually or constructively by a person *in authority*, it cannot be received, however slight the threat or inducement, and the prosecutor, magistrate, or constable, is such a person, and so the master or mistress may be.

If not held out by one in authority, they are clearly admissible.

(a) The Editor is indebted to the kindness of PARKE B., for his Lordship's MS. of the above judgment.

The authorities are collected in *Mr. Joy's* very able *Treatise on Confessions and Challenges*, p. 23.

But in referring to the cases where the *master* or *mistress* have been held to be persons in authority, it is only when the offence concerns the master or mistress, that their holding out the threat or promise renders the confession inadmissible.

In *Rex v. Upchurch*, R. & M., C. C. 865, the offence was arson of the dwelling-house, in the management of which the mistress took a part. *Reg. v. Taylor*, 8 C. & P. 703, is to the like effect; so *Rex v. Carrington*, 109; *Rex v. Howell*, 534; so where the threat was used by the master of a ship to one of the crew, and the offence committed on board the ship by one of the crew towards another; and in that case also the master of the ship threatened to apprehend him, and the offence being a felony, and a felony actually committed, would *528] have a power to do so, on reasonable *suspicion that the prisoner was guilty. In *Rex v. Warringham*, tried before me, *Surrey* Spring Assizes, 1851, the confession was in consequence of what was said by a mistress of the prisoner, she being in the habit of managing the shop, and the offence being larceny from the shop. This appears from my note.(a)

In the present case, the offence of the prisoner, in killing her child or concealing its dead body, was in no way an offence against the mistress of the house. She was not the prosecutrix then, and there was no probability of herself or the husband being the prosecutor of an indictment for that offence; in practice the prosecution is always the result of a coroner's inquest. Therefore, we are clearly of opinion that the confession was properly received.

Conviction confirmed.

(a) See *ante*, p. 447.

AN
INDEX
TO
THE PRINCIPAL MATTERS.

The pages referred to are those between brackets [].

ABANDONING CHILD.

An indictment alleged that the prisoner intending to injure the inhabitants of the parish of B., and to burthen them with the maintenance of a bastard child of the prisoner, four days old, and not named and unable to walk or to take care of itself or to make known its wants, did abandon and desert the said child without having provided any means for its support." *Held* bad (1), because there was no averment, that the prisoner had the means of supporting the child, or (2), that the child had sustained any injury by the abandonment.
Reg. v. Hogan, 277

ACT BOOK.

See PERJURY.

AMENDMENT.

See LARCENY.

ARRAIGNMENT.

14 and 15 *Vict. c. 19, s. 9*, makes no alteration in the mode of arraigning prisoners. *Reg. v. Shuttleworth*, 351. *Reg. v. Key*, 347

ASSAULT.

See ROBBERY.

Under 14 & 15 *Vict. c. 100, s. 11*, if a robbery under aggravated circumstances be charged in the indictment: *Held*, that the jury may find an aggravated felonious assault with intent to rob, and that the persons found guilty of such

an aggravated assault are liable to transportation for life under sects. 3 and 10 of 7 Wm. 4 & 1 Vict. c. 87; the assault following the nature of the robbery. *Reg. v. Mitchell*, 468

BAILEE.

See LARCENY.

BASTARD.

See ABANDONING CHILD.

A soldier was indicted for unlawfully and contemptuously refusing to comply with an order of Petty Sessions, made under stat. 7 & 8 Vict. c. 101, s. 3, requiring him to pay a sum of money weekly for the maintenance of a bastard child. *Held* (1) that an indictment would lie; (2) that the offence was a "criminal matter" within the exception in statutes 11 & 12 Vict. c. 11, s. 52, and 12 and 13 Vict. c. 10, s. 52 (Mutiny Act), and therefore the fact of the defendant being a soldier was no defence. *Reg. v. Ferrall*, 51

BASTARDY.

See PERJURY.

BURGLARY.

The prisoner was indicted for having burglariously broken and entered the house of the prosecutor, in the night time, with intent to steal the "goods and chattels" therein. The jury found that he broke and entered the house with intent to steal the mortgage deeds: *Held*, that being subsisting securities for the payment of money, mortgage deeds are *choses in action*, and as such, were improperly described in the indictment as goods and chattels, and, consequently, that the conviction was wrong. *Reg. v. Powell*, 403

BURIAL.

See NUISANCE.

CERTIFICATE.

Superintendent registrar's certificate for marriage without license. *Reg. v. Moorehouse James*, 7

CERTIORARI.

See PROCEENDO.

CHARACTER.

Reg. v. SHRIMPTON, 319.

CHOSSES IN ACTION.

See BURGLARY.

COIN.

See **UTTERING**.

PRINCIPAL (2).

COMBINATION.

See **CONSPIRACY**.

CONFESSION.

1. A police constable, who apprehended a man on a charge of murder, having told him the nature of the charge against him, said "he need not say anything to criminate himself: what he did say would be taken down, and used as evidence against him." The prisoner, thereupon, made a confession: *Held*, that the confession was rightly admitted in evidence.

Note.—*Reg. v. Drew*, 8 Car. & P. 140; *Reg. v. Morton*, 2 Moo. & Rob. 514; *Reg. v. Farley*, 1 Cox, 76, and *Reg. v. Harris*, ib. 106, are overruled. *Reg. v. Baldry*, 430

2. In order to render a confession by a prisoner admissible the prosecution must shew affirmatively, to the satisfaction of the Judge, that it has not been made under the influence of an improper inducement: if this appear doubtful on the evidence the confession ought to be rejected.

On an indictment for stealing the goods of two persons in partnership, a confession made after an inducement to confess has been held out in their absence by the wife of one of them, who assisted in the management of their business, is inadmissible. *Reg. v. Warringham*, 447

3. The wife of a person in whose house an offence is committed, such person not being prosecutor, nor engaged in the apprehension, prosecution, or examination of the offender, and the offence not being in any way connected with the management of the house, is not a person in authority within the rule which excludes confessions. *Reg. v. Moore*, 522

CONFIRMATION.

See *Reg. v. James*, 1.

MARRIAGE.

CONSPIRACY.

1. A conspiracy by false pretences to procure an infant female to have illicit carnal connection with a man, is an indictable misdemeanor at common law. *Reg. v. Meare*, 79
2. In an indictment for a conspiracy at common law to effect objects prohibited by a statute, it is enough to follow the words of the act of Parliament. Therefore an indictment which charged a conspiracy to force workmen to depart from their employment, to raise the rate of wages, &c., by "molesting," by "threats," by "intimidating," by "obstructing," &c., in violation of 6 Geo. 4, c. 129: *Held* good, without setting out the means employed to molest, intimidate, or obstruct, or the threats that were held out.

Three counts charged that the defendants conspired "unlawfully to intimidate, prejudice and oppress" the prosecutors in their trade and occupation, and "by

divers subtle means and devices, and wicked arts and practices, to injure and oppress" the prosecutors; and also to "intimidate, prejudice, and oppress" the same, and "to entice away their workmen, and thereby to injure and oppress" the prosecutors; the Court, without pronouncing these counts bad, recommended that a *nolle prosequi* should be entered in respect of these three counts.

Note—*Rex v. Turner*, 13 East, 228, and *Rex v. Pywell*, 1 Stark. 402, are overruled. *Reg. v. Rowlands and Others*, 264

CONSTABLE.

See *CONFESSION*.

EVIDENCE.

CORROBORATION.

See *PERJURY*.

COUNTING-HOUSE.

What is a counting-house under stat. 7 & 8 Geo. 4, c. 29, s. 15? *Reg. v. Potter* 235

CROSS-EXAMINATION.

In cross-examining a witness for the prosecution, the counsel will not be permitted to put the witness's deposition into his hand in order that he may read it, and then to ask him whether, having read it, he still perseveres in the statement which he made in Court. The proper course is to read the deposition to him at the time, and to cross-examine upon it, or to put it in afterwards as evidence for the prisoner. *Reg. v. Ford*, 245

DEFENDANT.

Must be present in Court when new trial moved for. *Reg. v. Caudwell*, 372; *Reg. v. Rowlands and Others*, 364

2. But not where defendant punishable merely by fine. *Reg. v. Parkinson*, 459

3. Not sentenced for nuisance in his absence. *Reg. v. Chichester*, 458

DEFILEMENT.

See *CONSPIRACY*.

DEMAND AND REFUSAL.

See *MARRIAGE*.

DEPOSITION.

1. Under stat. 11 & 12 Vict. c. 42, s. 17, the deposition of a witness, who is so ill as not to be able to travel, may be read in evidence before the grand jury, as well as before the petty jury. *Reg. v. Clements*, 251
2. See *CROSS-EXAMINATION*.

EVIDENCE.

The prisoner entered into the following agreement with the prosecutor :

"*S. W.* engages to take charge of the glebe-land of the Rev. *J. B. B. C.*, his wife undertaking the dairy and poultry, &c., at fifteen shillings a week, till *Michaelmas* 1850, and afterwards at a salary of 25*l.* a-year, and a third of the clear annual profit after all expenses of rent, rate, labour and interest on capital, &c., are paid, on a fair valuation, made from *Michaelmas* to *Michaelmas*. Three months' notice on either side to be given, at the expiration of which time the cottage to be vacated by *S. W.*, who occupies it as bailiff, in addition to his salary. *March* 12, 1850.

(Signed)

"*J. B. B. C.*

"*S. A. W.*"

Held, that this was not a contract of partnership, but an agreement for the hire of a labourer, and that being within the exemption of the Stamp Act, it was admissible in evidence unstamped.

The prisoner, in accounting with the wife of the prosecutor, as he was accustomed to do, on the 4th of *October*, denied the receipt of two sums of money which he had received on account of his master, and appropriated them to his own use: *Held*, that this was embezzlement, although *Michaelmas* was the time agreed upon when a valuation was to be made, and the profits ascertained. *Reg. v. Wortley*, 333

2. Improper reception of evidence. *Reg. v. Scrafe and Rooke*, 281
3. On the trial of an indictment, containing counts for stealing, and for receiving property of *A.*, knowing it to be stolen from other persons at other times, is not admissible to prove either the stealing or the receiving. *Reg. v. Oddy*, 264
4. A lunatic under confinement in a lunatic asylum, is admissible as a witness if the Judge considers him competent in point of understanding, and to be aware of the nature and sanction of an oath. The lunatic may be examined and cross-examined, and witnesses called on either side, in order to determine the question of competency; but when admitted, it is for the jury to determine whether his testimony is affected by his insanity, and what degree of weight is to be attached to it. *Reg. v. Hill*, 254
5. *A.*, a constable employed to watch a copse, seeing *B.* wrongfully carrying away wood therefrom, calls to him to stop, and on *B.*'s running away fires at and wounds him. *B.* had been frequently convicted summarily of the like offence, and by stat. 7 & 8 *Geo.* 4, c. 29, s. 39, such stealing, after two summary convictions, is a felony. The fact of these convictions, as well as of their legal incidents, was wholly unknown to *A.* *Held*, that *A.* was rightly convicted of wounding, with intent to do grievous bodily harm. *Reg. v. Dadson*, 35

EMBEZZLEMENT.

See *REG. v. WORTLEY*, 333.

ESCAPE.

1. In an indictment under 4 *Geo.* 4, c. 64, s. 43, for aiding a prisoner to escape

from prison, it is unnecessary to set out the means which had been employed by the defendant to aid the prisoner to escape.

2. Where a turnkey, after certain overtures from a prisoner confined in jail, received into his possession a key, capable of opening certain locks in the jail, which had been made by means of the procurement of the prisoner, who was then and there meditating his escape, with intent thereby, and by means thereof, to enable said prisoner to escape. *Held*, that this was a sufficient aiding within the statute.
3. And where upon an indictment containing nine counts, the Court of Quarter Sessions gave a general judgment that the defendant be transported beyond the seas for the term of fourteen years; and a writ of error was brought on the ground that some of the counts were bad. *Held*, that the fourteen years must be taken to be the same fourteen years upon each count, and that under 11 & 12 Vict. c. 78, s. 5, the Court of Error, if there were one good count in the indictment, would be bound either to pronounce the judgment which ought to have been pronounced in the Court below, or to remit the record to the sessions, in order that that Court should pronounce the proper judgment. *Holloway v. Reg. (Error)*, 287

ESTOPPEL.

See HIGHWAY.

FALSE PRETENCES.

1. A., a servant, had authority, in the absence of the chief clerk, to buy kitchen stuff for his masters, and to make payment to the seller. The chief clerk was directed by the master to repay A. for such purchases upon the bare production by A. of a ticket, containing a statement of such a purchase having been made. A. produces to the chief clerk a ticket containing a statement of a purchase which had not, in fact, been made, and thereupon the chief clerk paid him 2s. 3d. *Held*, that A. was not indictable for larceny, but for obtaining money under false pretences. *Reg. v. Barnes*, 59
2. A. was indicted for a common law misdemeanor in unlawfully attempting, by false pretences made to "B. and others," unlawfully to obtain goods, the property of the said B. and others, with intent thereby to cheat the said B. and others of the same.

It was proved that B. was one of the firm, and that the pretences were made to B. alone, though with intent to defraud the firm. *Held*, (1). That the words "and others," in the averment of the pretences, need not be taken to mean B. and his partners, since such a construction would make the indictment bad in arrest of judgment. (2). That those words were surplusage, and might be rejected, and that therefore, there was no variance.

Semble, per JERVIS, C. J. If the words "B. and others" were construed to mean B. and others and partners, proof of pretences to B. alone would be sufficient.

Semble, per ERLE J.—That on such a construction being adopted, evidence of pretences to any others but B. would be irrelevant, and, therefore, inadmissible.

Semble, per MARTIN B., that if the words "B. and others" were construed to

mean the firm, the proof as given was correct, and the objection of variance groundless. *Reg. v. Kealey*, 68

FEMALE.

See CONSPIRACY.

FINDING.

Where a bank note is lost, and is found by a person who appropriates it to his own use: *Held*, that the jury are not to be directed to consider at what time the prisoner, after taking it into his possession, resolved to appropriate it to his own use, but whether at the time he took possession of it he knew, or had the means of knowing, who the owner was, and took possession of it with intent to steal it; for if his original possession of it was an innocent one, no subsequent change of his mind, or resolution to appropriate it to his own use, would amount to larceny. *Reg. v. Preston*, 353

FORGERY.

See WARRANT AND ORDER.

GOODS AND CHATTELS.

See BURGLARY.

GRAND JURY.

See DEPOSITION.

HIGHWAY.

The defendant was indicted for the non-repair of a highway, which it was alleged he was liable to repair *ratione tenuræ*, in respect of certain lands called the *Saw-pit Field*.

To prove this liability, evidence was given of the conviction of *W. S.*, a former owner and occupier of the same lands, for the non-repair of the same highway, shewing that in the year 1801 a presentment had been preferred against him, alleging his liability to repair it *ratione tenuræ*, to which he pleaded guilty. Evidence was also given of the repair of the said highway subsequent to the conviction of *W. S.*, by the occupiers of the lands, of whom the *Saw-pit Field* formed part; that public notice was given when the said *Saw-pit Field* was offered for sale of the liability to repair the highway in question, and that the defendant who purchased the lands after such notice was now the owner and occupier of the same *Saw-pit Field*. *Held*, by all the Judges, that there was evidence to go to the jury of immemorial usage, and the defendant's liability to repair the highway *ratione tenuræ*.

Held, by PARKER B., ALDERSON B., PATTERSON J., and COLERIDGE J. that the defendant was estopped from denying his liability in consequence of the conviction of *W. S.* with whom he was a privy in estate.

Held, by PLATT B., that the immemorial usage, in respect of which the defend-

ant was charged, was not conclusively established, and that the question of estoppel, not having been raised at the trial, was not now matter for the consideration of the Judges. *Reg. v. Blakemore*, 410

HOUSE-BREAKING, (IMPLEMENTS OF.)

Keys are implements of housebreaking within 14 & 15 Vict. c. 19, s. 1; for though commonly used for lawful purposes, they are capable of being employed for purposes of housebreaking, and it is a question for the jury whether the person found in possession of them by night, had them without lawful excuse, with the intention of using them as implements of housebreaking.

Semble, per MAULE J., that the printed copy of the section of the statute is wrongly punctuated, and that the word "key" is within the express terms of the act of Parliament. *Reg. v. Oldham*, 472

IDEM SONANTIA.

See *REG. v. DAVIS*, 231.

INDICTMENT.

1. After verdict, defective averments in the second count of an indictment may be cured by reference to sufficient averments in the first count. *Reg. v. Waver-ton (Inhab.)*, 340
2. Refusal to solemnize a marriage. *Reg. v. James*, 1
3. An indictment in the first count charged *A.* with stealing a promissory note from the person of *B.*; in the second count with stealing a bank note from the person of *B.*; in the third count with receiving the aforesaid goods, "so as aforesaid feloniously stolen." *A.* was acquitted on the two first counts and convicted on the last. *Held*, on application to arrest the judgment, that after verdict, the indictment was not bad on the ground of repugnancy; because (1). the words of reference in the third count did not necessarily import a stealing the goods by *A.* (2.) If they did, that count did not thereby become intrinsically repugnant, but was conceivably capable of proof; and after verdict the Court would resort to any possible construction which would uphold the indictment against a purely technical objection. *Reg. v. Craddock*, 31

INCLOSURE.

See NIGHT POACHING.

INDUCEMENT.

See CONFESSION.

JUDGE (AT CHAMBERS).

See PROCURENDO.

JUDGMENT.

Court of Error will pronounce the proper judgment or remit the record to the Court below to do so. *Holloway v. Reg.* 217

JURISDICTION.

The prisoner was a travelling salesman, whose duty it was to go into the county of *D.* every *Monday* to sell goods and receive money for them there, and return with it to his master in *N.* every *Saturday*. He received two sums of money for his master in *D.*, but never returned to render any account of them. Two months afterwards he was met by his master in *N.*, who asked him what he had done with the money. The prisoner said he was sorry for what he had done; he had spent it.

Held, that the prisoner was rightly indicted in *N.*, there having been evidence to go to the jury of an embezzlement in *N.* *Reg. v. Murdock*, 308

KEY.

See HOUSE-BREAKING (IMPLEMENTS OF).

LARCENY.

1. Stealing pigeons. *Reg. v. Cheafor*, 361; *Reg. v. Howell*, 363.
2. Finding bank notes. *Reg. v. Preston*, 353
3. Two men, *J.* and *W.*, acting in concert, and intending to defraud *S.*, entered the shop of *S.*, and by means of an artifice induced him to draw a cheque on his bank for 42*l.*, payable in the name of the prisoner *J.*, and then to accompany *J.* to the bank to see it paid, on the understanding that they were to return to finish the transaction by the payment to *S.* of forty-two sovereigns, and that the prisoner *W.* was to remain at the shop till *J.* and *S.* went and returned from the bank.
At the bank, by the desire of *S.*, the banker handed four ten pound notes and two sovereigns to the prisoner *J.* in the presence of *S.*
The prosecutor *S.*, and the prisoner *J.*, left the bank together, and while on their way back to *S.*'s shop, *J.* went into an inn-yard, and promising to return immediately, absconded with the four ten pound notes, and the two sovereigns, which he and the prisoner *W.* (who in the meantime had gone off from the shop with the forty-two sovereigns) appropriated to their own use.
Held, that the misappropriation of the notes and two sovereigns was larceny, *S.* never having parted with the property and possession in them, and the prisoner *J.* having had no more than the bare custody of the money which he carried off. *Reg. v. Johnson and Wright*, 310
4. Where property is parted with by a bailee, under a mistake, his special property in it is not divested, and if a larceny of it be committed: *Held*, that it may well be laid as the property of such bailee.
Held also, that an amendment in the name of the owner of stolen property may be made, at the trial, by order of the Court, under 14 & 15 *Vict. c. 100, s. 1.* *Reg. v. Vincent*, 464
5. *A.*, bargaining with *B.* about some waistcoats, said, "You must go to the lowest price, as it will be ready money;" *B.* said "Then you shall have them for twelve shillings," to which *A.* assented. *A.* then said he should put the waistcoats into his gig, which was then standing at the door. *B.* replied "very well." *A.* drove off with the waistcoats without paying for them, and ab-

sconded for two years. The jury returned the following verdict:—"In our opinion the waistcoats were parted with conditionally, and the money was to be paid at the time, and that *A.* took with a felonious intent." *Held*, a larceny in *A.* *Reg. v. Cohen*, 249

6. *A.* employed by *B.* a tailor, to sell clothes for him about the country, was entrusted with a parcel of clothes on the following terms: *B.* fixed the price of each article, and *A.* was to sell each at that price, and to bring back the money and any unsold clothes to *B.*, and he was to have three shillings in the pound for his trouble. *A.* pawns some, and then fraudulently appropriates the rest.

Held, that such appropriation was larceny. *Reg. v. Poyser*, 233

7. In an indictment for larceny, the property stolen was laid as belonging to *Darius Christopher*. The prosecutor, when called, said that his name was *Trius*. *Held*, that it was entirely a question for the jury whether the two names sounded alike; and therefore, as it had been treated at the trial as a question of law for the Judge, the conviction was quashed. *Reg. v. Davis*, 231

8. Where property is parted with by a bailee, under a mistake, his special property in it is not divested, and if a larceny of it be committed: *Held*, that it may well be laid as the property of such bailee. *Held* also, that an amendment in the name of the owner of stolen property may be made, at the trial, by order of the Court, under 14 & 15 *Vict. c. 100, s. 1.* *Reg. v. Vincent*, 464

9. The prisoner took out of his pocket a piece of blank paper properly stamped with a sixpenny stamp, having led the prosecutor to believe that he was about to pay him the sum of 4*l.* 1*l.* 1*d.* due to him from one *P.* The prosecutor wrote upon the paper a receipt for the money; whereupon the prisoner took up the receipt, and left the prosecutor without paying him; and the jury found that he took it with intent to defraud: *Held*, that the prisoner could not be convicted of larceny, the prosecutor never having had such a possession of the paper as would have enabled him to maintain trespass. *Reg. v. Smith*, 349

10. *A.* was convicted on the 14th count of an indictment, which charged him with "stealing a piece of paper, the property of *Goldmid* and others, his masters." *Goldmid* and others were directors of the *Globe* Insurance Company, managed the affairs of the Company, appointed, paid, controlled, and dismissed the clerks and other servants, and had the charge and custody of all the books and papers of the Company. The Company had a drawing account with *Glynn & Co.*, and used to send their pass-books on *Tuesday* in every week to be written up, and their messenger went on the following morning to bring it back, when it was returned together with the cheques of the preceding week. *A.* was a salaried clerk in the office of the Company, and also a shareholder; it was his duty to receive the pass-book and vouchers from the messenger, and to preserve the vouchers for the use of the Company. On the 27th *February*, *Glynn & Co.* delivered the *Globe* pass-book, containing among other things a certain cashed cheque for 1,400*l.* to the messenger of the Company, who delivered the book and cheque to *A.*, in the usual way and he thereupon fraudulently destroyed it. *Held* (1), that the cheque was the property of the Directors, and that *A.*, though a shareholder in the Company, had no joint property in it. (2). That he was guilty of larceny as a servant, inasmuch as the cheque when delivered into the custody of *A.*, in the usual course of business, was

constructively in the possession of the directors, who under the circumstances were his masters. *Reg. v. Watts*, 14

LUNATIC.

See EVIDENCE.

MARRIAGE.

A clergyman was indicted for refusing to solemnize a marriage between *Henry F.* and *Ann H.*, who had obtained a certificate under stat. 8 & 7 Wm. 4, c. 85. It was proved that *Henry F.* applied to the clergyman after 9 P. M., on 2d August, and desired him "to fix a time for the marriage on or before the 14th August," after which day the certificate would be void. *Ann H.* was not with him. The clergyman said, "I will marry him when he has expressed a desire to be confirmed." *Henry F.*, thereupon, went away, and made no further application. *Held*, that this did not support a conviction on an indictment which averred that the clergyman "unlawfully &c., did refuse, &c. to solemnize a marriage, &c. at any time on, or before the said 14th day of August, or at any other time whatsoever;" inasmuch as the refusal made was absolute, and that proved conditional. *Semble*, that it should have been averred that the parties might lawfully be married to each other. *Reg. v. James*, 1

MATERIALITY.

See PERJURY.

MINUTES OF TRIAL.

See *REG. v. NEWMAN*, 390.

PERJURY.

MORTGAGE DEEDS.

See BURGLARY.

MUTINY ACT.

See BASTARD.

NEW TRIAL.

1. Where, upon the trial of an indictment against three prisoners for felony, it was proved that a witness had been kept out of the way by the procurement of one of the prisoners, *Held*, that the deposition of the absent witness was receivable in evidence against the prisoner by whose procurement she was kept away; but that it was not evidence against the other two prisoners, and that its reception, without a direction to the jury that it was not evidence against the latter was ground for granting a new trial. *Reg. v. Scaine and Rooke*, 281
2. In moving for a new trial where the defendant has been found guilty of a nui-

sance in obstructing a public sewer, and where he is liable not to personal punishment, but to a fine, it is not necessary that the defendant should be present in Court. *Reg. v. Parkinson*, 459

3. The defendant was tried on an indictment for perjury, at the *Berkshire* Summer Assizes, and having been found guilty was sentenced to transportation for seven years. On the 6th *November*, counsel being about to move in the Queen's Bench for a new trial.

Per Curiam. The defendant ought to be in Court. Sentence has been passed, which he has hitherto evaded; and the Court will not permit him to make the experiment of obtaining a new trial without coming into Court to abide the consequences in case we should refuse the rule. *Reg. v. Caudwell*, 372

NIGHT POACHING.

In order to bring a case of night poaching within the stat. 9 *Geo.* 4, c. 69, s. 9, it is not necessary to prove that three persons were all in the same close, or inclosure, or the same piece of open land, if all were of one party, one or more being armed, with the same common purpose in the place described in the indictment. *Reg. v. Uzzell and Others*, 274

NUISANCE..

1. See NEW TRIAL.
2. Where a defendant indicted for a nuisance in obstructing a navigable river, allows judgment to go by default, and is under no recognizances to appear in the Queen's Bench for judgment, the Court will not *in his absence* give judgment that the nuisance be abated, though notice has been left at his residence of the intention of the Crown to pray for judgment; the proper course being to sue out a writ of *capias* and proceed to outlawry. *Reg. v. Chichester*, 458
3. A parent who has not the means of providing burial for the body of his deceased child, is not liable to be indicted for a misdemeanor in not providing for its burial, even though a nuisance be occasioned by allowing the body to remain unburied, and although the poor law authorities of the union have offered him money to defray the expenses of burial, by way of loan, as he is not bound, under such circumstances, to contract a debt. *Reg. v. Vann*, 325

PERJURY.

1. Perjury was assigned on a statement made by the prisoner upon a trial at Nisi Prius, that in *June*, 1851, he owed no more than one quarter's rent to his landlord. The prosecutor swore that the prisoner owed five quarter's rent at that date; and to corroborate the prosecutor's evidence, a witness was called, who proved that in *August*, 1850, the prisoner had admitted to him that he then owed his landlord three or four quarter's rent: *Held*, that this was not such corroboration as is necessary to sustain an indictment for perjury. *Reg. v. Boulter*, 396
2. On a trial where it was material to prove whether *J.* had died before *M.*, the

defendant produced a document purporting to be a copy of *J.*'s will, and falsely swore that he had examined it with the original will in the registry at *L.*; and also that he had examined a memorandum at the foot of the copy of the will with the entry in a book called the Act Book in the same registry. The Judge offered to admit the evidence, but it was withdrawn; it was, in point of law, inadmissible.

Held, that the circumstances that the evidence was inadmissible and was withdrawn, did not affect the question of perjury, as it could not purge the false swearing; and that, as it was material whether probate of *J.*'s will was granted in the lifetime of *M.*, if the evidence of the prisoner had been received, it would have been material to the issue, and, consequently, that the false oath of the prisoner amounted to perjury.

Semble, per MAULE J.—That false swearing in a judicial proceeding, in a matter material to that judicial proceeding, is perjury, whether the false oath be relevant or not to the issue then being tried. *Reg. v. Philippotts*, 302

3. On the trial of an indictment for perjury, to prove the fact of former trial, in the same Court of Oyer and Terminer, in which the indictment for the perjury is preferred: *Held*, that the production by the officer of the Court of the caption, the indictment, with the indorsement of the prisoner's plea, the verdict, and the sentence of the Court upon it, together with the minutes of the trial, made by the officer in Court, was sufficient evidence of it, without the production of the record, or a certificate of the same, under 13 & 14 *Vict.* c. 99, s. 13. *Reg. v. Newman*, 390
4. *A.*, a defendant in a suit tried before a county Judge, gave false evidence before an arbitrator to whom the suit was referred, and by whom *A.* was sworn. *Held*, that under stat. 9 & 10 *Vict.* c. 95, s. 77, the arbitrator had no authority to administer an oath, and therefore, *A.* was not liable to be indicted for perjury. *Reg. v. Hallett*, 237
5. Indictment for perjury; *Held*, to contain sufficient averments of the identity of the party, respecting whom the perjury was committed. *Reg. v. Bennett*, 240
6. Where perjury was committed, on an application for an order in bastardy made before justices, a former application having been dismissed on the merits: *Held*, that the prisoners were rightly convicted of perjury. *Reg. v. Cooke*, 462

PICKLOCK.

See HOUSEBREAKING, (IMPLEMENTS OF.)

PIGEONS.

The prisoner was indicted for stealing four tame pigeons, the property of *J. M.*: *Held*, that he was properly convicted of larceny; tame, *i. e.* reclaimed pigeons, although unconfined, with free access, at their pleasure to the open air, being as much the subjects of larceny as domestic fowl, which are allowed to go at large. *Reg. v. Cheafor*, 361

PRESCRIPTION.

See HIGHWAY.

PREVIOUS CONVICTION.

1. If a prisoner on cross-examination of the witnesses for the prosecution, elicit evidence as to his good character, it is "giving evidence within the proviso in the stat. 14 & 15 Vict. c. 19, s. 9, and the prosecutor can, in answer thereto, give proof of the prisoner's previous conviction. *Reg. v. Shrimpton*, 319
2. 14 & 15 Vict. c. 19, s. 9, makes no alteration in the mode of arraigning prisoners, and it is the opinion of all the Judges that it is unnecessary for the jury to be re-sworn when trying the question of previous conviction. *Reg. v. Shuttleworth*, 351
3. Where a prisoner is indicted for felony, and there is a count in the indictment stating a previous conviction, he is first to be arraigned on the whole indictment; afterwards he is to be given in charge to the jury on the subsequent felony only; and if they find a verdict of guilty on that charge, then they are to inquire respecting the previous conviction. And where the jury were sworn afresh to try the question of previous conviction, and the prisoner's counsel then claimed the right of challenge: *Held*, that the prisoner had no right of challenge then, and that the jury were re-sworn unnecessarily. *Reg. v. Key*, 347

PRINCIPAL.

1. A principal in the second degree, *particeps criminis*, cannot at the same time be treated as a receiver. *Reg. v. Perkins*, 459
2. The prisoner and one *J.* were indicted for a misdemeanor in uttering a counterfeit coin. The uttering was effected by *J.* in the absence of the prisoner, but the jury found that they were both engaged on the evening on which the uttering took place, in the common purpose of uttering counterfeit shillings, and that in pursuance of that common purpose *J.* uttered the coin specified in the indictment: *Held*, that the prisoner was rightly convicted as a principal, there being no accessories in misdemeanor.
Notes.—*Rex v. Elae*, Russ. & Ry. 142, and *Reg. v. Page and Jones*, 1 Russ. on Crimes, 82, are overruled. *Reg. v. Greenwood*, 453

PROCEDENDO.

A Judge of either of the superior Courts, sitting at Chambers, has power under 1 & 2 Vict. c. 45, s. 1, to issue a *procedendo*.

It is in the discretion of the Judge, when an application is made by the Crown to have the record of an indictment for the felony removed by *certiorari* into the Queen's Bench at the instance of the defendants, remitted by *procedendo* to the original jurisdiction, whether he will make a conditional order, and summon the defendants to shew cause against it, or make the order absolute in the first instance without summoning the parties.

Seemle, that where the defendants neglect to take down the record and to give due notice of trial, a *procedendo* will be granted. *Reg. v. Scelfe*, 513

PROPERTY.

See LARCENY.

RECEIPT.

See UTTERING.

RECEIVER.

See PRINCIPAL.

RECEIVING.

1. *A.* and *B.*, two thieves, were seen to come at midnight out of a house belonging to *C.*'s father, under the following circumstances. *A.* carried a sack containing the stolen goods; *B.* accompanied him; *C.* preceded them, carrying a lighted candle. All three go into an adjoining stable belonging to *C.* and then shut the door. Policemen enter the stable and find the sack lying on the floor tied at the mouth, and the three men standing round it as if they were bargaining; but no particular words were heard: *Held*, by eight Judges to four, that on this evidence *C.* could not be convicted of receiving stolen goods, inasmuch as although there was evidence of a criminal intent to receive, and of a knowledge that the goods were stolen, yet the exclusive possession of them still remained in the thieves, and therefore *C.* had no possession, either actual or constructive. *Reg. v. Wiley*, 37
2. Two persons charged in an indictment with joint receiving, ought not to be sentenced thereon on proof of two distinct felonies. If a verdict of guilty be given against both, judgment may be given against the party who is proved to have committed the first felony in order of time. *Reg. v. Gray*, 86
But now see 14 & 15 *Vict. c. 100*, s. 14.

RECORD.

1. See *Holloway v. Reg.* 217
2. See *Reg. v. Newman*, 320

REQUEST.

A. was indicted for forging a certain warrant, order and request, in the words and figures following, (the instrument was then set out in full.) It was proved to be only a request: *Held*, that as the instrument was set out in full, the description of its legal character was surplusage, and therefore caused no variance. *Reg. v. Williams*, 61

ROBBERY.

See ASSAULT.

A. was indicted for feloniously assaulting *B.*, putting him in fear and danger of his life, feloniously and violently stealing from his person, and before, at, and after such robbery, feloniously beating him against the form of the statute, and against the peace. Verdict, Guilty of assaulting and beating, with intent to rob. *Held*, that the above finding would not warrant a conviction of assault, either at common law, or under the statute 7 & 8 *Wm.* 4 & 1 *Vict.* c. 85, s. 11. and that the judgment must be arrested. *Reg. v. Reid*, 88

SHED.

A building, twenty-four feet square, with wooden sides, glass windows, slated roof, and commonly called the work-shop, used as a storehouse for seasoned timber, as a place for the deposit of tools, and for the working up of timber, may be described as a "shed" in an indictment under statute 7 & 8 *Vict.* c. 62. s. 1. *Reg. v. Amos*, 65

SOLDIER.

See BASTARD.

STAMP.

See EVIDENCE.

SUMMONS.

See PROCEEDENDO.

UTTERING.

Where the prisoner placed a forged receipt for poor rates in the hands of the prosecutor for the purpose of inspection only, in order, by representing himself as a person who had paid his rates, fraudulently to induce the prosecutor to advance money to a third person: *Held*, that this was an uttering within 1 *Wm.* 4, c. 66, s. 10. *Reg. v. Ion*, 475

2. The indictment charged *A.* with having "uttered and put off false coin." *Held*, proved, although the coin was refused by the party to whom it was offered. *Reg. v. Welch*, 87

WAGES.

See CONSPIRACY.

WARRANT AND ORDER.

The following forged document was held to be both a warrant and an order within the statute 11 *Geo. 4* & 1 *Wm. 4*, c. 66, s. 3:—"Mr. *Lowe, London*, bought of *C. Dawson, English* and foreign fruit merchant and potatoe salesman, two bushels of apples, 9s. Nov. 9. Sir, I hope you will excuse me sending for such a trifle, but I have received a lawyer's letter this morning, and unless I can make up a certain amount by 1 o'clock, there will be an action commenced against me, and I am obliged to hunt after every shilling. Yours, &c., *F. Dawson.*" *Reg. v. Dawson*,

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WIFE (INDUCEMENT BY WIFE OF PROSECUTOR).

See CONFESSION.

WORKMEN.

See CONSPIRACY.

WRIT OF ERROR.

See ESCAPE.

JURISDICTION.











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